



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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
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17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

---

**DECISION**

---

## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
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6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
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## **Consultation**

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  - i) the proposed Works;
  - ii) the reason for the proposed Works;
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- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
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15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
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BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

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9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
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11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
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17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
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- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : BIR/00CT/LDC/2020/0011

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

---

## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected take to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected take to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : BIR/00CT/LDC/2020/0011

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : BIR/00CT/LDC/2020/0011

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : BIR/00CT/LDC/2020/0011

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88).The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

- 22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
- 23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : BIR/00CT/LDC/2020/0011

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

24. The insurance broker has advised that for a variety of reasons, including cladding issues following Grenfell, extreme weather and the Covid 19 pandemic, many insurance providers are reducing their capacity and pulling out of the market altogether. Consequently, the Applicant's broker is seeing insurers decline renewals and/or new business terms only provide a percentage of the underwriting capacity, high premium increases and/or co-insurance clauses.
25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020





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

**Case Reference** : **BIR/00CT/LDC/2020/0011**

**Properties** : **Properties at Waters Edge, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**  
  
**Properties at Waterside Heights, Waterside  
Dickens Heath, Shirley, Solihull B90 1UD**

**Applicant** : **Dickens Heath Management Company Limited**

**Representative** : **Dentons UK and Middle East LLP**

**Respondents** : **The long leaseholders of Waters Edge  
The long leaseholders of the Waterside Heights**

**Type of Application** : **An application under section 20ZA of the Landlord  
and Tenant Act 1985 for dispensation of the  
consultation requirements in respect of qualifying  
works.**

**Tribunal Members** : **Judge T N Jackson  
Mr V Ward Bsc Hons FRICS Regional Surveyor  
Mr T W Jones BSc, Dip Surv, FRICS, MCI Arb, MEWI**

**Date of Paper  
determination** : **17<sup>th</sup> November 2020**

**Date of Decision** : **24<sup>th</sup> November 2020**

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**DECISION**

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## **Decision**

**The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to upgrade fire alarm systems and remedy defective fire stopping.**

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

## **Reasons for decision**

### **Introduction**

1. By application dated 17<sup>th</sup> September 2020, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to upgrade fire alarm systems and remedy defective fire stopping at the Properties ('the Works').
3. Directions were made on 21<sup>st</sup> September 2020. Direction 6 required any Leaseholder who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Leaseholders of Flat 83 Waters Edge objected to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable. Indeed, there are separate, on-going service charge applications currently stayed:  
BIR/OOCT/LSC/2020/0003;  
BIR/OOCT/LIS/2020/0007;  
BIR/OOCT/LIS/2020/0010.
6. References to page numbers in this Decision relate to the pages of the Applicant's bundle.

### **Background**

7. Waters Edge is a purpose-built block of 25 residential apartments. Waterside Heights is a purpose-built block of 45 residential apartments.
8. The apartments within the Properties are the subject of leases between Dickens Heath Development Company Limited (1), Dickens Heath Management Company Limited (2) and the Respondents. The leases are for a term of 999 years from 1 January 2003. We have been provided with a copy of the template Lease.

## **Proposed Works**

9. The Applicant proposes to carry out the following qualifying works to both Waters Edge and Waterside Heights as more particularly described in the Scope of Works attached in the Applicant's bundle (pages 8 to 15):
  - a) Installation of an automatic fire detection and alarm system in each Property as specified in NFCC guidance 'Guidance to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats' (pages 16-33), in order for the Applicant to implement a permanent simultaneous evacuation strategy (which is considered acceptable as the stair cases in both buildings are landlocked and only open onto the external elevations at the entrance doors at ground level); and
  - b) Fire stopping works as recommended in the 'Passive Fire Protection Survey' report dated November 2019 (pages 34 to 64) prepared by the Applicant's external fire consultants Quantum Compliance in relation to each Property together with a copy of Quantum's 'External Cladding Cavity Survey Report' of the same date (pages 65 to 87).
10. The Applicant says that it is necessary to carry out the Works because investigations by Quantum Compliance have shown that fire stopping in the Properties is generally poorly installed or missing in some instances. The investigations indicate there is potential for excessive fire spread via the cavities in the external wall system. This poses a serious risk to the health and safety of residents and other users of the Properties, and to the Properties themselves. It is also a requirement of the Properties' insurance that steps are taken to remedy the defects.

## **Procurement Process**

11. The Applicant has, through its managing agents Savills plc, carried out a procurement exercise in respect of the Works to be carried out. Details of the procurement process that was undertaken are set out in detail in annex A of a letter dated 10<sup>th</sup> of August, 2020 to the leaseholders of the Properties (pages 5 to 6). Annex B of the letter (pages 7 to 15) sets out DES Build Ltd priced response to an Employer's Requirements Document prepared by Savills and Quantum Compliance.
12. The Applicant intended to carry out the proposed Works and to engage DES Build Ltd as the main contractor, subject to any observations received by the leaseholders following a truncated consultation process. The estimated total cost of the Works is £230,000 exclusive of VAT. The breakdown of the costs is set out in the Scope of Works (pages 7 to 15).

## **Consultation**

13. By letter dated 10<sup>th</sup> of August, 2020, sent to all leaseholders, the Applicant carried out a truncated consultation exercise (pages 1-15). The letter sets out:
  - i) the proposed Works;
  - ii) the reason for the proposed Works;
  - iii) the timescale for the proposed Works;

- iv) the procurement exercise undertaken including the identity of the Applicant's selected contractor and how they have been selected; and
  - v) the estimated cost of the Works.
14. The letter invites the leaseholders to make observations on the proposed Works, proposed expenditure and proposed contractor selected and to provide the Applicant with the name of any of person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed Works.
15. The letter invites observations to be made to the Applicant in writing within the consultation period of 30 days ending on the 15<sup>th</sup> of September 2020 following which the Applicant would consider the observations and take any relevant further steps. The Applicant would then arrange for the Works to commence as soon as possible, the aim being by 1<sup>st</sup> of October, 2020.
16. As at the 17<sup>th</sup> of September 2020, the consultation period had ended and only one written response, dated 9<sup>th</sup> September 2020, had been received (page 88). The response primarily concerns the leaseholders' contribution to the cost of the works, the possibility of recovering costs from the original contractor and the impact on the works of the proposed sale of the freehold, rather than the proposed Works or costs themselves.
17. We are told that since the application, the Applicant has appointed DES Build Ltd and preliminary works commenced at the end of September 2020 in order that the Works can be completed before the 31<sup>st</sup> of December 2020.

### **Hearing/Inspection**

18. The Applicant's Statement of Case contained two reports both of which included photos of the exterior and interior of the Properties. The Respondent had not disputed the photographic evidence. In light of the current Public Health Epidemic, having had regard to the reports and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
19. Neither party requested a hearing and we determined the matters on the papers.

### **The Law**

20. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

## **Submissions**

### The Applicant

22. The Works are required for health and safety purposes to ensure the safety of the Properties and their occupants. The Works are expected to take at least three months to complete and there is insufficient time for the Applicant to carry out the full section 20 compliant consultation exercise and complete the Works ahead of the Properties' insurance renewal date in December 2020.
23. At the last insurance renewal date in December 2019, the insurers terms were subject to a condition that 'these matters [were] being addressed and in a timely manner'. The insurer required the Applicant to provide an update on what progress had been

made within 60 days of the renewal date. Due to funding issues, the fire remedial works had not been carried out and, as a result, the Applicant submits that there is a risk that the insurance renewal in December 2020 may be affected.

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25. The broker has advised that if the Works are not progressed before the date of the next insurance renewal on 31<sup>st</sup> of December, 2020, the Applicant may not be able to obtain the required insurance cover for the Properties, or that the cost of securing the necessary cover (which will be passed on to the leaseholders under the service charge clause) will be substantial.
26. Further, until the fire alarm upgrade works are completed there must be an ongoing 'waking watch' at the Properties to assist the evacuation of the occupants in the event of a fire, at an ongoing cost of around £25,000 plus VAT per month. This is a significant on-going cost to the management company and/or the leaseholders through the service charge. The Applicant submits that it is therefore in the interests of all parties that the 'waking watch' is brought to an end as soon as it is safe to do so.
27. The truncated consultation exercise has given the leaseholders sufficient information and time to make observations on the proposed Works, proposed expenditure and proposed contractor selected and for the Applicant to take those observations into account before any agreement for the Works was entered into.
28. The Applicant submits that the steps taken in (1) taking expert advice from an external fire safety consultant on works required, (2) obtaining input on the proposed Works from the West Midlands Fire Service and (3) procuring a contractor for the Works via a reputable property agent are sufficient to ensure that the Works deliver value for money for the leaseholders. The Applicant submits that the leaseholders will suffer no financial prejudice as a result of the truncated consultation process. Further, it submits that the leaseholders would still be able to dispute the costs of the Works under section 19 of the Landlord and Tenant Act 1985.
29. The Applicant submits that there is a real risk that the Properties will be uninsurable or only insurable at a substantial cost if the Works are not completed before the end of 2020. If this were to happen, the Applicant submits this would have severe ramifications for the leaseholders' including (i) if the Properties were uninsurable the leaseholders may be in breach of their residential mortgage conditions (insofar as the parties are mortgaged), and/ or (ii) their Properties would be unsaleable.
30. Further, until the Works are completed, a waking watch at a cost of £25,000 plus VAT is being incurred by the management company and/or leaseholders. The Applicant submits that the truncated consultation process was therefore in the leaseholders' financial interests

## The Respondent

31. In the letter of objection, the Respondent submits that:

- i. The level of charges being passed to the leaseholders does not reflect the cost of works and services being carried out now or planned in the future;
- ii. Service Charges have previously been levied for the costs of work not actually carried out;
- iii. Granting a Dispensation removes the right of leaseholders to pre-approve costs from reputable companies and at standard industry prices for services and works;
- iv. Leaseholders will be financially prejudiced if they are charged for major works that have not been through proper consultation;
- v. The current charge of £25,000 per month for the waking watch does not reflect the minimal staff resources employed;
- vi. Lack of clarity of the calculation of service charges by previous managing agents in previous service charge years.

## **Deliberations**

32. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Properties, their residents and users.
- ii. If the Works are not carried out urgently and before the 31<sup>st</sup> December 2020, there is a high risk that the Properties will become uninsurable or that the cost of insurance will be significant.
- iii. Pending the completion of Works relating to an automatic fire detection system, it is necessary to have a 24- hour waking watch which incurs a substantial cost each month.
- iv. The Respondent has not identified how the the truncated consultation process has prevented him from objecting to the Works or identifying an alternative contractor. Leaseholders were given 30 days to respond. There is limited evidence that the Respondent was unable to or was prevented from responding to the consultation exercise, although truncated. One leaseholder did respond but did not address the scope of the Works, the estimate or the proposed contractor. The Respondent has not submitted any evidence of any proposed alternatives to the Works, the estimates or the proposed contractor.
- v. The majority of submission relates to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable. The Respondent has not identified any prejudice that they have or might suffer due to the truncated consultation process and the failure to comply with the statutory consultation time period.

- vi. We do not consider that the Respondent is prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

### **Determination**

- 33. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.
- 34. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

### **Appeal**

- 35. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson  
24<sup>th</sup> November 2020