FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/LDC/2019/0214**
Property	**:**	**Olivers Wharf, 64 Wapping High Street, London E1W 2PJ**
Applicant	**:**	**Olivers Wharf (Management) Limited**
Representative	**:**	**Mr Michael Walsh, Counsel instructed by Forsters LLP and Mr James Haas Company Secretary of the Applicant**
Respondent	**:**	**The Leaseholders of Olivers Wharf as set out on the application and in particular Mr John C Head III**
Representative	**:**	**Mr John Beresford, Counsel instructed by Pinder Reaux Solicitors**
Type of Application	**:**	**Application for dispensation under the provisions of section 20ZA of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Mr C P Gowman MCIEH MCMI BSc**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR on 3rd February 2020**
Date of Decision	**:**	**14th February 2020**

DECISION

DECISION

1. The Tribunal determines that it will grant unconditional dispensation from the consultation requirements under section 20 of the Landlord and Tenant Act 1985 (the Act) in respect of the following matters at Olivers Wharf, 64 Wapping High Street, London E1W 2PJ (the Property):

   (a) The installation of a fire detection system as required by Article 13 of the enforcement notice dated 7th October 2019 issued by the London Fire Brigade (the Notice).
   (b) The provision of reports necessary to comply with Article 15, 17 and 8 of the Notice in respect of which the costs of those surveys, we were advised at the hearing, were £1,000 plus VAT for the door survey and £2,600 plus VAT for the compartmentalisation survey.
   (c) The associated works arising from the insurance claim in respect of the fire in Flat 5C at the Property, not covered by the insurance claim, involving six flats, 5B, 5C, 4C, 3C, 2C and 1C together also with associated works to the common parts arising from the fire including the making good of the wall between Flat 5C and escape staircase as provided for at Article 14 of the Notice. The bulk of this work we were advised will be undertaken by contractors instructed by the insurers and form part of the insurance claim following the fire.

2. In respect of the other items of works set out on the notice we decline to give dispensation from the consultation requirements at this stage. Instead we set out below directions that need to be complied with in the hope that once the additional information has been made available to Mr Head he will feel able to either consent to the remainder of the dispensation application, or if he maintains his objection, agree to it proceeding as a paper determination in due course.

BACKGROUND

1. On 7th October 2019 the London Fire Brigade issued an enforcement notice in respect of works to be undertaken at the Property. This Notice was issued following an investigation into a fire in Flat 5C. As a result of the Notice the Applicants were required to undertake various items of work to satisfy the Fire Authority that the Property was safe. Initially those works were to be undertaken and completed by a date in January but the timescale has now been extended until 2nd March 2019.

2. As a result of the Notice the Applicant applied to the Tribunal for dispensation from the consultation requirements required under section 20 of the Act on 17th December 2019. The application recites the urgent works found to be required by the Fire Authority and seeks dispensation in respect of all works required under the Notice. A copy of the application and supporting documents were served on the leaseholders of the Property of whom, according to the application, there are 23. It appears that 21 leaseholders raised no objections to the application for dispensation. However, Mr Head III of Flat 20 did object as did his former wife Miss Gainfort-Head, although she took no part in the proceedings.

3. Prior to the hearing we were provided with a bundle of papers prepared by the Applicant containing the application, the Notice, details of the bids that had been

obtained in respect of the installation of the fire detection system, copies of a draft board meeting held on 5th December 2019 and correspondence both with the Tribunal from Forsters LLP and to leaseholders at the Property. In addition, copies of correspondence passing between Forsters LLP and Pinder Reaux, solicitors for Mr Head III, were included together with a sample of the lease, in this case for Flat 3B.

4. In addition to this bundle we were provided with skeleton arguments by Mr Walsh for the Applicant and Mr Beresford for Mr Head III and a the copy of the judgment in the case of Daejan Investments Limited v Benson and others [2013]UKSC14.

HEARING

5. At the start of the hearing Mr Walsh indicated that it was not the intention of either side to call any witnesses of fact but instead to make submissions based on the papers before us and on the law. He told us that at the present time there was no idea as the likely costs of compartmentalisation nor indeed for the replacements of doors to the flats, which appeared, it seems, to be within the demise of the individual leaseholders. We were told, however, that the Applicant was going to proceed to replace the doors and that the costs would be recovered from the leaseholders. It should be noted that each leaseholder is a member of the Applicant Company.

6. We were told also that the flat fire in 5C was being dealt with through an insurance claim and that some of the works that were part of the Notice would be dealt by insurers' contractors at no expense to the leaseholders, save, we assume, any policy excess. We were told also that a survey in respect of the fire doors and the compartmentalisation had been undertaken and was available but had not been sent to Mr Head III. Apparently, the decision was taken not to do so because he was in arrears with his service charges and there was concern that production of this documentation might frustrate any future claims for forfeiture. It appears that the documents were to be sent through to Mr Head's solicitors, but it does not appear that that has been dealt with by the time of the hearing.

7. We were told that the majority of the costs of the work would come from reserves but that the fire doors would be paid for by the individual leaseholders.

8. In respect of the fire alarm installation it was said that the consultation had, in most respects, been followed in that a number of quotes had been obtained. Details of those bids were to be found in the bundle, and there was an analysis of the various bids that had been undertaken by Mr Haas and Mr Coote, the Building Manager. The spreadsheet showing that bid analysis was included in the bundle. The quote to be adopted from Hades Fire Protection was also included showing an overall cost of some £26,953.20 for the installation of the fire alarm.

9. Mr Walsh took us through his skeleton argument, which was of assistance to us. This set out the chronology of various events, which we have noted. There seems no point in repeating this information as it is common to both parties who have been involved in the application. There is an element of background to Mr

Head's involvement, which it does not seem to us to be of relevance in determining this application. The skeleton argument does indicate that the installation of the communal fire system can be carried out immediately subject to our decision on dispensation.

10. The skeleton argument went on to set out in some detail the consultation process which was required to be undertaken under the provisions of section 20ZA which rests in part II of schedule 4 of the Services Charges (Consultation Requirements) (England) Regulations 2003 (the Regulations). After setting that information out Mr Walsh moved on to deal with the legal framework for dispensation relying to a large extent on the findings of the Supreme Court in the Daejan v Benson case, which he recited in some detail.

11. His final submissions were that Mr Haas and Mr Coote had gone to great lengths to ensure the consultation process under the Regulations had largely been followed. Relying on the Supreme Court's findings in Daejan he submitted that the purpose of consultation was to ensure that tenants were protected for paying for inappropriate works or paying more than would be appropriate. His view was that prejudice was to be reflected in some financial loss to the lessees. However, his submission was that Mr Head had failed to show any prejudice and that even if the full consultation process has been followed it was difficult to see how the outcome would have been any different from that which is presently before us.

12. It appeared that more information was available in respect of the replacement of the doors of flats and the compartmentalisation in the form of surveys which had been undertaken but had not been provided to Mr Head or indeed his solicitors. Mr Walsh appeared to indicate that this was not something that we needed to concern ourselves with, but he did volunteer Mr Haas to give more evidence on the surveys and the reasons for not providing Mr Head with same. Mr Beresford objected to this and we supported his objection as it seemed to us that the witness statements prepared by Mr Haas should have reflected this additional information that was available to him, albeit in the case of the fire doors, only some two to three days before the hearing.

13. Mr Walsh went on to support the proposition that the Respondents were still provided with protection in respect of their rights to challenge the actual costs and the reasonableness of the works under the provisions of section 19 and 27A of the Act. He told us that the important matter was that we should focus on any prejudice that Mr Head says that he may suffer, although he should be reminded that as a director of the Applicants he could face claims for criminality if there is non-compliance with the Notice. It was, Mr Walsh said, important that those who reside in the building are safe from fire.

14. Mr Walsh then reviewed Mr Head's evidence, which he said showed no financial prejudice. Insofar as the suggestion by Mr Head that a sprinkler system should be installed to the common parts, and that the failure to consult had prevented this happening, Mr Walsh suggested that this could be dealt with on a retrospective basis if it was necessary. It was, however, not a requirement under the terms of the Notice.

15. Mr Walsh posed the question as to what Mr Head could have done if consultation had been undertaken. It would have been possible for him to have nominated another contractor certainly in respect of the fire safety system, but he has not done so. Furthermore, his statements identify no financial prejudice. Mr Head also appeared not to be a member of the residents 'WhatsApp' group, which would have enabled him to have seen documentation and apparently had been advised as to the board meeting which was held in December of last year. It was also said to us that this is not a case where Mr Head should be entitled to recover his costs. He had failed to participate in the decision making process and it was clear from the statements that there is a degree of animosity between Mr Head and Mr Haas and others. It was also unclear what had been achieved by requiring this matter to be dealt with at a hearing. Mr Walsh was of the view that we could have confidence in granting dispensation on the basis that all leaseholders were members of the Applicant Company and, save for Mr Head and to an extent his former wife, there were no objections.

16. Mr Beresford then took us through his skeleton argument. which as with Mr Walsh's we do not see the need to repeat in any great detail. His view was that with the fire having occurred apparently in November of 2019 there was plenty of time for the Applicant to have undertaken the consultation process. There was a board meeting in December following which the application was made for dispensation. It was said that Mr Head was not advised of the board meeting until 8 o'clock in the morning of the day the meeting was planned. Furthermore, the analysis of the tender bids, it was said, was only produced to Mr Head last week. In those circumstances it was said by Mr Beresford that Mr Head had little opportunity to object and certainly not to nominate contractors. It was drawn to our attention that the minutes of the board meeting. which were within the bundle, included details of the apparent dispute between Mr Head and the Applicant and it would therefore have been inappropriate for Mr Head to have attended the board meeting in any event if there were going to be discussions about his alleged liability.

17. On the question of prejudice Mr Beresford was of the view that Mr Head will suffer prejudice if the consultation requirements are not undertaken. We were referred to paragraph 67 of the Daejan case but of course it must be remembered that this was in respect of retrospective dispensation not prospective dispensation, as is the situation in the matter before us. Indeed it was suggested that because these works were prospective Mr Head did not have the benefit of hindsight that might have been available to him if the works had already been undertaken and in those circumstances we should be 'very sympathetic' to him when considering the issue of prejudice. One example of prejudice was the allegation that Mr Head had been deprived of the opportunity to suggest works, which should include a sprinkler system. It is suggested that the landlord would have accepted this observation that a sprinkler system should be installed and the fact that the works are proceeding without is prejudicial to Mr Head and it is suggested other leaseholders.

18. There was also a suggestion that the potential prejudice could arise in the eventual structural works to the building which will be carried out to a property which is apparently Grade II Listed.

19. Mr Beresford's skeleton argument went on to indicate that if dispensation was granted it should be on the condition that the landlord should comply with a shortened consultation process in respect of the necessary works, should pay Mr Head's legal costs and that the landlord should not seek to pass any of the costs to the leaseholders incurred in making the application. The submission then went on to set out in more detail the reasons why the landlord should pay Mr Head's legal costs, which we have noted.

20. One matter that was raised during the course of the hearing was the allegation that Mr Head had indicated that he was not happy to have his flat door included in the survey. He denied this and confirmed to us that he was very happy to have his door surveyed both internally and externally.

21. In answer to questions from the Tribunal Mr Haas told us that he considered it would be impossible for the compartmentalisation and the installation of the fire doors to be completed by 2nd March 2020, which is the extension so far granted by the Fire Authority. However, his view was that the Authority needed to see that progress was being made on these elements and it would then be possible to negotiate another timescale for dealing with these outstanding matters. What the Fire Authority wanted to see were proposals. It was intended that the fire alarm system would be installed before 2nd March.

22. In respect of Mr Head's claim for costs Mr Walsh's response was that the Applicant was required to come to Tribunal for dispensation, but it could have been dealt with on paper had Mr Head not requested a hearing. Furthermore, clear directions were given to Mr Head to produce evidence as to the allegations he made in his witness statement of 8th January 2020 which Mr Walsh submitted he had failed to do. The prejudice in this case was financial, intended to prevent too much being paid or that costs being incurred were inappropriate. It was said that Mr Head raised spurious allegations. The installation of a sprinkler system was without merit and no evidence whatsoever of financial prejudice had been produced.

FINDINGS

23. Having heard the evidence, considered the witness statements of Mr Head and Mr Haas, the statements of case and response and also considered the skeleton arguments from both Counsel, we came to the conclusion, as we indicated to the parties at the hearing, that we would be prepared to grant dispensation in respect of certain elements of works required under the Notice from the Fire Authority.

24. We consider that dispensation from the consultation requirement should be granted in respect of the following items of work as set out on the Notice:

    1. The works required under Article 13 being the installation of the fire detection system at a price of £26,953.20 which we understand can be carried out in the near future and certainly by the extended date of 2nd March 2020.

    2. Although if these items had been dealt with separately they would not of themselves required dispensation, but as they do appear to be part of the overall scheme, we are prepared to grant dispensation from consultation in

respect of the costs of providing reports dealing with compartmentalisation and the need for fire doors to the flats and common parts. Within the bundle available to us there was an email from Fire Door Guardian dated 1st December 2019 confirming they could undertake a survey of the doors in the building to assess their suitability at a price of £1,000 plus VAT. On the next page in the bundle was an email from A D Designs Consultants Limited in which they indicated that they would be able to carry out a compartmentalisation survey of the walls and floors as required under the Notice at a price of £2,600 plus VAT.

25. The other matter that we were asked to consider, and to which Mr Head at the hearing agreed, was dispensation in relation to the works that would be required following the repair to Flat 5C and the associated walls, which was not covered by the insurance claims.

26. We were told that there had been water/fire damage to flats 5B, 5C, 4C, 3C, 2C and 1C. In addition, there was damage to the common parts on the fifth and sixth floors. It is not wholly clear to us what the extent of the works will be that the insurance company will pay for, but it was agreed by Mr Head and not objected to, as we understand it, by any of the other leaseholders, that costs associated with the common parts arising from the fire and which were not covered by the insurance claim would be undertaken and form part of the general works for which dispensation was required This seems reasonable and in the circumstances we are prepared to grant dispensation as the leaseholders will retain their rights under the Act to challenge the costs under s19 and s27A of the Act..

27. As we indicated above, we were somewhat concerned that information relating to the compartmentalisation and the flat and common parts doors had not been provided to Mr Head. We can see no reason why they had not been made available and the suggestions that somehow it would have affected any claim for forfeiture seem to us to be somewhat misplaced.

28. In those circumstances we intend to issue directions in the hope that the provision of further information to Mr Head will encourage him to accept the application for dispensation in respect of the compartmentalisation and fire door works. To that end, therefore, we make the following directions:

    1. By the **2nd March 2020** the Applicant will provide to Mr Head copies of the compartmentalisation survey and the fire door surveys together with any schedules of work and tenders that have been obtained. At this moment it is not thought necessary for these documents to be produced to other leaseholders but it is intended by the Tribunal that a copy of this decision will be circulated to each lessee by the Applicant and if they request sight of these surveys they should be made available.

    2. Mr Head is to respond to the documents produced to him **by 12th March**. If at this point in time Mr Head feels satisfied that the information made available to him enables him to withdraw his objection to the dispensation application then he should notify both the Applicants and the Tribunal immediately.

3. If there is no withdrawal by Mr Head of his objections, then the Respondents should make a reply to Mr Head's objections by **19th March 2020**.

29. It is considered that the matter can be dealt with by way of a paper determination in the week commencing **30th March 2020** unless any party within 14 days of the date of this decision requests a further hearing.

30. We then propose to consider the costs applications that have been made. We are not prepared to make an order under section 20C of the Act or paragraph 5 of schedule 11 of the Commonhold and Leasehold Reform Act 2002. It seems to us that this would be something of a pointless exercise. The leaseholders are either obliged to pay in that capacity or as members of the Applicant. In those circumstances, therefore, there seems no point in making orders in respect of these two matters as unless the Applicant can recover the funds it puts its existence in potential jeopardy.

31. More problematic is the question as to whether or not Mr Head should be entitled to recover any of his legal costs. The question for us to consider is whether or not the conduct on the part of the Applicant has been in any way unreasonable in accordance with the provisions of Rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013. It is not a foregone conclusion that costs would be awarded in this case and the parties are referred to the Upper Tribunal authority of *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC). Our finding is that once these further directions have been complied with an application for costs could be made by either party under the provisions of the Rules and we will then issue directions. The time for making the application is extended until 28 days after the final decision is made.

32. We hope that the parties will in fact be able to reach agreement in respect of the ongoing works as clearly it is important that these fire prevention and fire safety issues are dealt with as quickly as possible.

Andrew Dutton

Judge:

A A Dutton

Date: 14th February 2020

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.