



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

**Case References** : **BIR/00FY/LDC/2021/0021P**

**Property** : **The Park Octagon, 141 & 143 Derby Road,  
Nottingham NG7 1AF**

**Applicants** : **The Park Octagon (Nottingham)  
Management Company Limited**

**Applicants  
Representative** : **J B Leitch Solicitors**

**Respondents** : **The Long Leaseholders  
The Park Octagon Apartments**

**Respondents'  
Representatives** : **None**

**Applications** : **Application under s20ZA Landlord and  
Tenant Act 1985 for dispensation of the  
Consultation requirements in respect of  
Qualifying works**

**Tribunal** : **Tribunal Judge Peter Ellis  
Regional Surveyor Vernon Ward BSc FRICS**

**Date of Hearing** : **5 November 2021**

**Date of Decision** : **10 November 2021**

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**DECISION**

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***Upon considering the application, the Tribunal is satisfied it is reasonable to dispense with the consultation requirements of s20 Landlord and Tenant Act 1985 in respect of work described in the application.***

## **Introduction**

1. This is an unopposed application to dispense with all or any of the consultation requirements in relation to qualifying works associated with remediation of The Park Octagon 141 & 143 Derby Road Nottingham (the Property) to resolve issues relating to the construction of the external wall system. Following investigation, the Applicant has learned the construction comprises combustible materials which are identified as a health and safety hazard by reason of the risk of fire.
2. The application relates to works necessary to remove and replace all combustible foam type insulation arising from the decision by the UK government to remove all unsafe cladding from buildings above 18 metres following the Grenfell fire tragedy.
3. The Applicant is The Point Building RTM Limited, the residents managing company and landlord. The Respondents are the long leaseholders. The leaseholders are named in the schedule attached to this Decision. They have been served with the application in accordance with Directions given by the Tribunal.
4. The application was issued on 15 September 2021. Directions for service of the application on the long leaseholders and the service of evidence were given on 24 September 2021. As none of the parties requested an oral hearing the Tribunal directed the matter be listed for determination on the papers and without an inspection. This Decision was made after the Tribunal met in a CVP video conference call.
5. The Applicant served its Statement of Case together with supporting documents in accordance with Directions. No objections or submissions were

made by any of the Respondents. Factual matters noted in this Decision are based upon the evidence of the Applicant.

### **The Property and the Leases**

6. The Tribunal has not carried out an inspection of the property however from the information provided, The Park Octagon is a purpose-built residential block comprising 23 apartments situated near to the centre of Nottingham and close to a desirable residential area. It is approximately 19.9metre tall. The apartments within the Property are subject to long leases on substantially similar terms. One lease was exhibited to the Applicant's Statement of Case.
  
7. The Tribunal is satisfied that the relevant terms of the lease (5<sup>th</sup> Schedule clauses 7.3, 9, 12,26 and 28 combined) impose on the landlord an obligation to inspect, clean, repair, rebuild, review and reinstate all external walls. The lease shown to the Tribunal was dated 23 November 1998. It provided that the obligation to provide the relevant services would fall upon the Management Company. On 23 January 2005 the Applicant acquired the freehold including the obligation to provide the services. In return the leaseholders are obliged to pay service charges for the provision of the landlord's services in discharge of its obligations (clause 4.2).

### **The Works**

8. The Applicant was made aware that works were required to the Property relating to the construction of the external wall system which comprised of combustible material posing a risk of fire spread. Property services and consultancy company Keegans Group (Keegans) were instructed to carry out an inspection and desk top evaluation to complete the RICS EWS 1 form. Their updated and revised report was submitted on 14 October 2020.
  
9. A copy of the report was exhibited to the Applicant's Statement of Case. It recommended remedial action including but not limited to

- a. removal of all combustible foam type insulation from all areas where either terracotta or aluminium cladding is located then replacing it with suitable non-combustible alternative.
  - b. All areas of timber cladding (typically on the ground floor) required removal together with combustible battens or flanges
  - c. Fitting of horizontal vertical cavity barriers to lines of compartmentation on all separating floors and at all vertical party wall zones
  - d. Removal of timber decking to the penthouse external terrace area and replacement by a suitable non-combustible material
  - e. Full removal and replacement of timber soffit boards to the projecting canopy roof at ground level with a suitable non-combustible material.
  - f. Removal and replacement with non-combustible material of all pipes, ducts, ventilation elements and components
10. The report then advised the appointment of a professional design team to develop a works package of remedial actions to address the matters identified.
11. In response to the advice the Applicant appointed Tri-Fire Limited to undertake a fire safety review of the Property. The RICS EWS1 External Wall Fire Review form produced by Tri- Fire graded the Property as follows:  
*B 2 - I have concluded that an adequate standard of safety is not achieved, and I have identified to the client organisation the remedial and interim measures required (documented separately).*
12. Their report was received on 14 January 2021. The conclusion was that the exterior of the building did not comply with the consolidated guidance “Advice for Building Owners of Multi Storey, Multi Occupied Residential Building” January 2020 published by the Ministry of Housing Communities and Local Government. A copy of the report was submitted to the Tribunal.
13. The Applicant decided to carry out works required to the Property which would ordinarily require consultation pursuant to s20 of the Act and the Service Charges (Consultation Requirements) (England) Regulations 2003.

14. The work required involved significant intervention to the Property in order to effect the remediation recommended by Keegans. The list of works was included in a Notice of Intention issued by Encore the Applicant's management agent in October 2020. A specification of works was prepared in January 2021 by Keegans. A copy of the specification was submitted to the Tribunal but the Applicant asserts that due to the scale of the required work the specification may change prior to commencement of the project. The cost of BSF eligible work is anticipated as £850,223.23 and the anticipated cost of ineligible timber balcony works is £27,634.28. A copy of the full works and earlier cost template was submitted to the Tribunal.
15. The Applicant intends to proceed with a design and build contract in which a main supervision consultant (Keegans) is appointed to facilitate the design and construction of the works. A design and build contract involves the appointment of the main/supervising consultant to facilitate the design and construction of the work. The Applicant has appointed Keegans as the principal designer/lead consultant.

### **The Building Safety Fund**

16. The Applicant by its managing agent, Encore, made an application to the Building Safety Fund (BSF) for payment of the full cost of applicable remedial works. It asserts the application for payment by the BSF is in the interests of the Respondents.
17. On 26 August 2021 the Applicant received confirmation that the full works and costs in the sum of £850,223.23 (including VAT) had been approved by the BSF. The costs of works to the timber balconies in the anticipated sum of £27,634.28 (including VAT) were not eligible. The letter of approval from the BSF to the Applicant was submitted to the Tribunal.
18. The BSF had required a full costs application by 30 June 2021. The full works and costs were submitted to the BSF based upon the cheapest tender (of three obtained) following an invitation to tender process which is fully described in

the Applicant's Statement of Case. The submission included a tender evaluation by Keegans of the lowest tender which concluded the price was fair and reasonable. The tender evaluation was presented to the Tribunal. Acting on the advice of Keegans the Applicant has appointed Elhance Limited (the lowest tenderer) to carry out the project works and the ineligible balcony works. The BSF deadline for commencement of the works was 30 September 2021.

### **Consultation**

19. The Applicant asserts that the design and build consultation method of delivering the works is in the interests of the Respondents. The offer letter from the BSF requires that the Applicant "proceeds at pace to enter a works contract" to undertake the work and "ensure works begin on your anticipated start date". It also requires that the leaseholders are kept fully informed of the works and progress in their delivery. The requirements of s20 Landlord and Tenant Act 1985 (the Act) are incompatible with the funding obligations and will inhibit delivery of necessary fire safety works.
  
20. The Applicant started the consultation process by the issue of Stage 1 Notification on 29 October 2020, but having secured the BSF grant the Applicant wishes to undertake the work in accordance with the guidance and requirements of the BSF. Also, the JCT Design and Build method of procurement does not comply with s20 requirements as a lead consultant has been appointed by the Applicant to coordinate the work.
  
21. In addition, the Applicant asserts the Respondents will suffer no prejudice in proceeding in the way proposed. The application process required the Applicant to obtain quotes for specified work and the Applicant proposes to use the cheapest tender secured in that process. The majority of the cost of the works will be covered by the BSF grant.

## **The Statutory Framework**

22. S20(1) of the Act limits the relevant contributions of tenants unless the consultation requirements have been either:
- a. Complied with in relation to the works or agreement, or
  - b. Dispensed with in relation to the works or agreement by (or an appeal from) the appropriate Tribunal

And subsection 3 provides that s20 applies to qualifying works if the relevant costs in carrying out the works exceed an appropriate amount.

23. S27ZA of the Act provides in so far as relevant:

*“(1) Where an application is made to the appropriate Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.*

*(2) In section 20 and this section—*

*“qualifying works” means works on a building or any other premises,*

24. By regulation 6 of Service Charge (Consultation Requirements)(England) Regulations the appropriate amount (as referred to in s20 of the Act) is an amount which results in the relevant annual contribution of any tenant being more than £250.00.

## **Decision**

25. In *Aster Communities v Chapman & Others [2021] EWCA Civ 660*, Lord Justice Newey referred to the Supreme Court Decision in *Daejan Properties Limited v Benson [2013] UKSC 14* and the decision of Lord Neuberger when directing how to decide applications for dispensation in these terms: *“The main, indeed normally, the sole question” when considering whether to dispense with consultation requirements was whether there was “real prejudice to the tenants flowing from the landlord’s breach of the requirements” (paragraph 50). Lord Neuberger said in paragraphs 44 and 45: “Given that the purpose of the requirements is to ensure that the tenants*

*are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT [i.e. the leasehold valuation Tribunal] should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements.*

*45 Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be—ie as if the requirements had been complied with."*

26. The Tribunal respectfully considers that the decision of Lord Justice Newey applying the decision of Lord Neuberger in *Daejan Properties v Benson* is that there is a presumption that dispensation will be given (on terms if considered appropriate) unless the leaseholders are likely to suffer prejudice.
27. In this case the leaseholders have not objected to the work required. The lack of a response by the leaseholders is not of itself determinative of the issue of prejudice or whether or not it is reasonable to dispense with the consultation requirements.
28. The Applicant has supplied a full and detailed description of the work required to remedy the problem with the safety of cladding presently in use at the Property. The Tribunal has seen the reports obtained by the Applicant, the letter from the BSF offering a grant and all other relevant correspondence justifying its decision to make this application. The Tribunal is satisfied it is reasonable to dispense with the consultation requirements in this case. The lack of any suggestion from the Respondents that they are prejudiced by this application is noted when making this Decision.
29. Accordingly, the Tribunal grants the dispensation requested under Section 20ZA and determines accordingly.



30. The parties will realise that this application is restricted to the issue of whether or not it is reasonable to dispense with consultation requirements. The issue of the reasonableness and payability of the cost of works is a matter which may be the subject of other applications.

### **Appeal**

31. Any appeal against this Decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this Decision, (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Tribunal Judge P J Ellis