



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

**Case Reference** : **LON/00BG/LDC/2021/0236**

**Property** : **Ink Court, 419 Wick Lane London  
E3 2PW**

**Applicant** : **Wick Lane Wharf Management  
Limited**

**Respondents** : **The leaseholders of the flats within  
the property**

**Type of Application** : **Application under section 20ZA to  
dispense with consultation  
requirements for a scheme of  
Major work**

**Tribunal Members** : **Judge Daley  
Ms Fiona Macleod MCIEH**

**Date and venue of  
Paper Determination** : **17 November 2021 Paper  
Determination dealt with remotely**

**Date of Decision** : **17 November 2021**

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**DECISION**

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## **Decision of the tribunal**

- i. The tribunal grants dispensation in respect of the major works relating to the external wall cladding and balcony decking identified as required in the fire engineering report prepared by Design Fire Consultants on 10 November 2020.**
  - ii. The Tribunal directions that the Applicant shall provide a written response within 28 days of the date of this decision, to the email representation of Rafal Hejne dated 28 October 2021. The response should deal with his query in relation to (i) why the balcony works are considered to be part of the service charges rather than the direct responsibility of individual lessees. (ii) set out the provisions in the lease relied upon by the Applicant. (iii) provide written information regarding the tender report for the balconies, and the justification for using the Everlast Water proofing.**
- ii. The Tribunal makes no order for the cost occasioned by the making of the application.**

## **The application**

1. The applicant by an application, made in 8 September 2021 sought dispensation under section 20ZA of the Landlord and Tenant Act 1985 from part of the consultation requirements imposed on the landlord by section 20 of the 1985 Act<sup>1</sup>.
2. The premises which are the subject of the application are a seven- storey purpose- built residential building comprising 112 residential units and three commercial units.

## **The Background**

3. This application, sought an order for dispensation of the consultation requirements in respect of the premises, the grounds upon which the dispensation is sought, is somewhat mixed, in that the work is required on the grounds of health and safety, and the urgency is based on the need to secure funding to assist with the work, so that the cost due is not the sole responsibility of the leaseholders.

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<sup>1</sup> See Service Charges (Consultation Requirements) (England) Regulations 2003 (SI2003/1987)

### *The work*

4. The background to the need for the work, is beyond the scope of this application, as it involves the Grenfell fire and the loss of life and the subsequent enquiry as to how the fire had spread through the building. It has found that one of the causes was the external cladding. By the Regulatory Reform (Fire Safety) Order 2005, there was an on-going duty on the applicant as landlord to comply with the duties placed on them by that regulation.
5. The applicant commissioned a fire engineering assessment from Design Fire Consultants. On 10.11.2020, the consultants produced a report. The findings which are set out in the report noted that the wall cladding system and the decking of the balconies were constructed using combustible material.

### *The funding*

6. Various tendering exercises took place, and in addition the Applicant secured funding for the entire costs of the cladding including scaffolding. This meant that the cost of the balconies subject to the terms of the lease, were a major work which could be charged as a service charge which required consultation under Section 20 of the Landlord and Tenant Act 1985. There was a requirement that in order for funding to be granted under the Building Safety Fund the works must begin by 30 September 2021.

### *Directions by the Tribunal*

7. On 17 September 2021, directions were given by the Tribunal
8. Directions were given in writing on 17.09.2021, setting out the steps to be taken by the Applicant, (including serving the directions on the respondents) for the progress of this case.
9. The Directions at paragraph (4) stated that -: “...The only issue for the tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. This application does not concern the issue of whether any service charge costs will be reasonable or payable.”
  - (i) The Directions also provided that -: *Those leaseholders who oppose the application must by 05.10. 2021 -: complete the attached form and send it by email to the Tribunal; and*
  - (ii) *Send to the applicant/ landlord by email or post a statement in response to the application with a copy of the reply form by email or by post. They should send with their statement copies of any documents upon which they wish to rely.*

10. The Directions also provided that the application would be determined on the basis of written representations in the week commencing 25.10. 2021, and that any request for a hearing should be made by 01.10.2021.
11. No request was made for a hearing, and the Tribunal satisfied itself that the matter was suitable to be dealt with on the papers.

### **The Applicant's case**

12. The Tribunal was provided with a bundle comprising 215 pages which included written statement of the reasons for the application together with the application form, and the report referred to above as part of the applicant's case.
13. In the written statement the Applicant set out at paragraph 10, that in respect of unsafe balconies the guidance issued by the MHCLG in January 2020 provides 7.3 that the removal and replacement of any combustible material used in balcony construction is the clearest way to prevent external fire spread from balconies..."
14. In October 2020 the applicant tendered for the remediation work for the cladding and the balconies as a single project. In their application the applicant noted that Everlast Waterproofing Limited submitted the lowest tender for cladding works (which was subject to grant funding) at £1,768,456.31, however the balcony works at £151,094.10 were not as competitive as other contractors who tendered for the work.
15. The applicant also noted that if dispensation were granted, there was likely to be cost savings as the work to the balcony would take advantage of the existing scaffolding for the cladding work, which was estimated as being at a cost of around £500,000 plus VAT. The applicant stated that there would also be advantages in respect of any increase in the cost of insuring the non- fire safe compliant building as against a complaint building.
16. At the time that the applicants submitted their bundle they noted that there were no responses from the leaseholders, either opposing or agreeing to the work.
17. However it would appear that subsequent to this Mr Hejne, indicated to the tribunal that he wished to raise objections. The Tribunal informed Mr Hejne, that he had served his objections later than the time set out in the directions, and was out of time, however he was invited to make any observations by 27 October 2021.

## *Objections from a leaseholder*

18. The Tribunal is in receipt of an email from Mr Rafal Hejne dated 28 October 2021, which was served outside the time for objections. In his brief email he stated that he wanted to have funding to nominate an expert to consider whether the works to the balcony are necessary, and whether they were subject to the service charge provisions of the lease.

### **The tribunal's decision and reason for the decision**

- I. The Tribunal has noted that the only issue which it is dealing with is whether it is reasonable to dispense with the statutory consultation requirements, it is not in this application required to make a finding concerning the reasonableness and payability of the work. However in *Daejan Investment Ltd v Benson 2013* it was noted in paragraph 54. That “ ... the LVT is not so constrained when exercising its jurisdiction under section 20ZA (1) it has power to grant a dispensation on such terms as it thinks fit-provided of course that any such terms are appropriate in their nature and their effect...”
- II. The Tribunal noted that the issues raised by Mr Rafal Hejne, are matters that he would no doubt have wished to raise on consultation, and although they do not affect the remit of the Tribunal's decision, there is no reason why the applicant would be prejudiced in answering these questions. The Tribunal has also born in mind that the report and the tendering was carried out in October 2020, and that there has been no great explanation as to the reason for the delay in either consulting, or carrying out a partial consultation exercise prior to seeking dispensation.
- III. However the Tribunal having considered all of the evidence in detail is satisfied that without the works, the building would be unsafe, and that consultation would prolong the period in which the leaseholders were living in an unsafe building. It has also noted that the work to the balcony is required to ensure the safety of the building, and that to delay these works, whilst consultation is carried out would result in an increase to the costs to the leaseholders, and would also pro-long the period in which the building remained unsafe.
- IV. The Tribunal noted that its jurisdiction in this matter is somewhat limited and the scope is set out in Section 20ZA and as discussed by the court in *Daejan –v- Benson (2013)* which requires the Tribunal to decide on whether the leaseholders would if dispensation is granted suffer any prejudice. Although the Tribunal does not find that there is any prejudice to the dispensation being granted. **The Tribunal would note that the limit in its jurisdiction has meant that although the Tribunal has considered whether the work is within the scope of the repairing covenant in the lease, it is for the**

**landlord to satisfy themselves of this and to determine the proportion payable by each leaseholder. As nothing in the Tribunal's decision deals with the reasonableness or payability under the lease of the work in issue.**

- V. Further the Applicant **shall within 28 days** provide the Respondent with the answers to the questions that the tribunal has set out in (ii) of its decision above.
- VI. The leaseholders will of course enjoy the protection of section 27A of the 1985 Act so that if they consider the costs of the work are not reasonable (on the grounds set out above or any other ground) they may make an application to the tribunal for a determination of their liability to pay the resultant service charge.
- VII. No applications were made for costs before the tribunal.

**Judge** Daley

**Date** 17 November 2021

**Appendix of relevant legislation**

**Landlord and Tenant Act 1985**

**Section 27A**

- (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
  - (a) the person by whom it is payable,
  - (b) the person to whom it is payable,
  - (c) the amount which is payable,
  - (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
  - (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
  - (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

## **Section 20**

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) 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 on appeal from) a leasehold valuation tribunal.
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  - (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  - (a) an amount prescribed by, or determined in accordance with, the regulations, and
  - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

1. **S20ZA Consultation requirements: supplementary**

- (1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long-term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.
- (2) In section 20 and this section—
  - "qualifying works" means works on a building or any other premises, and
  - "qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.
- (3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—



- (a) if it is an agreement of a description prescribed by the regulations, or
  - (b) in any circumstances so prescribed.
  - (4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.
  - (5) Regulations under subsection (4) may in particular include provision requiring the landlord—
    - (a) to provide details of proposed works or agreements to tenants or the Recognised tenants' association representing them,
    - (b) to obtain estimates for proposed works or agreements,
    - (c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
    - (d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
    - (e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.
  - (6) Regulations under section 20 or this section—
    - (a) may make provision generally or only in relation to specific cases, and
    - (b) may make different provision for different purposes.
  - (7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament. [...]
2. The relevant Regulations referred to in section 20 are those set out in Part 2 of Schedule 4 of the Service Charge (Consultation etc) (England) Regulations 2003.