FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/22UJ/LDC/2020/0030**
Property	**:**	**Edinburgh House, Edinburgh Gate, Harloww, Essex Harlow CM20 2JE**
Applicant	**:**	**Edimbugh House Property Management Ltd (Management Company)**
Representative	**:**	**Bankside Commercial Ltd. (Solicitors)**
Respondents	**:**	**Heather Reid (1) (Leaseholder) Jingjing Xiang (2) (Leaseholder)**
Representative	**:**	**None**
Landlord	**:**	**Land Charter (Harlow) Ltd.**
Type of Application	**:**	**S20ZA of the Landlord and Tenant Act 1985 - dispensation of consultation requirements**
Tribunal	**:**	**N. Martindale FRICS**
Hearing Centre	**:**	**Cambridge County Court, 197 East Road, Cambridge CB1 1BA**
Date of Decision	**:**	**26 March 2021**

DECISION

Decision

1. The Tribunal grants dispensation from the requirements on the applicant to consult all leaseholders under S.20ZA of the Landlord and Tenant Act 1985, in respect of the qualifying works arising from the EWS1 report referred to in this application. Dispensation is granted on terms, as set out at the conclusion.

Background

2. The management company applied to the Tribunal under S20ZA of the Landlord and Tenant Act 1985 ("the Act") for the dispensation from all or any of the consultation requirements contained in S20 of the Act.

3. The application related to faults identified from a prior External Wall Survey (EWS1) and the works arising to remedy them. The report client was the landlord. The work is being carried out by the management company who deemed it to be their responsibility, under the leases of all flats at the Property to effect and that it is for them to recharge costs under the service charge provisions to all flats in the Property.

Directions

4. Directions dated 15 December 2020 were issued by the Judge Wayte Regional Judge of the Tribunal, without an oral hearing. They provided for the Tribunal to determine the applications in the 7 days on or after 25 January 2021, unless a party applied within 7 days of issue of Directions. No request was received by the Tribunal.

5. The applicant management company, was, by 23 December 2020 to send to each of the leaseholders a copy of the application form and the Directions. They were to display a copy prominently within the common parts. They were to certify compliance to the Tribunal, by 4 January 2021.

6. Leaseholders who objected to the application were to send a reply form and statement to the Tribunal by 13 January 2021. The applicant was to prepare a bundle of documents including the application form, Directions, sample lease and all other documents on which they wanted to rely; with 2 copies to the Tribunal and 1 to each respondent leaseholder and do so by 20 January 2021.

7. The applicant failed to comply with the Directions in several important regards. The certification by their solicitor, to the Tribunal, was only made on 18 January 2021, over 2 weeks late. Moreover it did not certify that any, let alone all of the leaseholders had been individually served with the documents, as directed. This was puzzling since the application was made on grounds of particular urgency. There are some 250 flats in the Property.

8. The applicant maintained to the Tribunal as late as 20 January 2021 in their email of that date: *"Please note we have received no formal reply from any leaseholder as proved by direction 4."* However The Tribunal informed the applicant later that day, confirming: *"The Tribunal received 2 replies from leaseholders. They both state that they sent a statement to you in reply. Please confirm whether you received the statements in response from the Leaseholders ?"* An 'amended bundle' was sent to the Tribunal later on 20 January 2021.

9. The applicant is a substantial management company, advised and served by an established firm of regulated solicitors and it began the action in respect of urgent fire safety works. Despite this, these several significant failures by the applicant to comply with the first set of Directions necessitated additional Directions which were issued on 22 January 2021. At para.(3) the attention of the applicant was specifically drawn to; *"... and has failed to produce the bundles required by para. 5 of the initial directions, submitting belatedly various separate documents which do not include the requisite explanatory documents referred to in the application form."*

10. The second set of Directions required service prior and certification to the Tribunal by 5 February 2021 that they had served these Directions on all respondents as well as complied with the earlier Directions again by that date. The first and second respondents then had until 19 February 2021 to file their statements with the applicant and the Tribunal.

11. In reviewing the bundle the Tribunal noted that the applicant had again failed to comply, in that it did not include with the bundle a copy of the EWS1, the key document on which the whole scheme of works was to be justified. By way of reply the applicant referred the Tribunal to a separate electronic document sent to the Tribunal earlier. The piecemeal delivery of documents to the Tribunal was a characteristic of the application and again contrary to both sets of Directions.

12. In the event, the Tribunal did not receive any requests for a hearing, nor did it receive any additional forms from other potential respondents either supporting, or objecting to the application, other than the two named respondents who both objected to application for dispensation.

13. The Tribunal determined the case on the bundle received from the applicant and additionally referred to the separate electronic document not submitted with the bundle, the EWS1. The applicant stated in earlier correspondence that this document had been available to leaseholders through an electronic 'drop box'. The Tribunal accepted this assurance.

Applicant's Case

14. The Property appears to consist of the large medium rise, purpose built, post war, office block, located on the western edge of Harlow. It was formerly occupied by Pearson publishers, but, since converted into some 250 residential flats. At the date of application 14 November 2020, although a majority of the flats were reported as sold, a significant number of the flats, around 20%, had not been.

15. The application at box 7 confirms that these are to be qualifying works and that they had been started. At box 9 the applicant was content for paper determination and applied for them, at box 10, to be dealt with by Fast Track. The reason given was stated: *"An external wall survey had revealed that works are necessary to comply with recent governmental requirements relating to fire safety. The applicant believes that any works necessary to comply with the safety regulations are urgent by their very nature."*

16. The application at box 'Grounds for seeking dispensation', 1. stated: *"The qualifying works are expected to be removing bands of the stone cladding inserting fire breaks at each floor level and reinstalling the stone removing insulation from the metal panels on the north elevation and inserting fire breaks at each floor level and reinstating the panels removing insulated panels where extractor fans went through windows and re-installing with a non combustible material removing wood decking and screens and replacing with alternative materials improving party wall junctions with some glazing on the fifth floor. The works will commence as soon as the scaffolding the erection of which began Monday 2 November 2020 is completed. It is anticipated that the works will take 3 - 4 months."*

17. The application at box 2. below this, described the consultation that had been carried out or is proposed to be carried out; *"We sent a letter to all the residents dated 1st November 2020. We received a number of responses the majority of which were by email. A number were by telephone. We replied to those responses on 4 November 2020."*

18. The application at box 3. explained why they sought dispensation of all or any of the consultation requirements. *"The works concern fire safety. The need for the works has been identified. The works necessary to comply with the new fire safety requirements have been identified. The works*

can be carried out forthwith. In the circumstances it seems to us wrong to delay. The potential consequences of a fire that might be exacerbated because the works had not been done in circumstances in which they could have been done outweigh the need for consultation."

19. The applicant referred to the EWS1 a report on fire safety compliance and recommended actions including building works to remedy the identified defects. The detailed report extends to some 100 pages. First prepared on 25 September 2020, it was amended to take account of comments from the client Land Charter Harlow Ltd., the landlord, (not the applicant) and finalised on 30 October 2020. The report is from Omega Fire Engineering Ltd., trading as BB7.

20. The report's Technical Summary of the defects, is at p.5. *"In relation to the design and construction of the external walls to the best of my knowledge the primary materials used do not meet the criteria of limited combustibility or better: In relation to the installation of cavity barriers these did not appear to be appropriately installed to the best of my knowledge: In relation to attachments to the external wall there are attachments (stacked balconies) whose design includes significant quantities of combustible materials (ie material that are not of limited combustibility or better).*

21. The report at p.6 *"…Whilst a waking watch is not considered necessary for the reasons explained above, in the event of a fire, the building is not currently considered to present a sufficiently low risk to the occupants in the long term and it will put some unnecessary strain on the fire service…"* And, *"All remedial work recommended within Section 8.2* (of?) *this report should be undertaken in a time scale which is reasonably practicable."*

22. In their letter dated 4 November 2020 to 'Residents' the applicants stated at para 1: *"Whilst there is a lower short term risk there is still a risk. We don't think it right that any risk should continue for longer than it has to. Further, if we are able to carry out the works now, but don't and there were a fire in say February next year most residents would be rightly critical. Further on this, it is also the case that until the works identified by the report we received have been carried out, it will be al but impossible for any lessee in the building to sell or remortgage their flat. This is because the Council for Mortgage Lenders now required their valuer to see an External Wall Survey (EWS1) report and evidence that any recommendations in it have been carried through before they value a property."*

23. In their letter dated 4 Noevember 2020 at para 6 refers to some early leaseholder objections: *"Land Charter (Harlow) Limited is acting out of self interest because it still has unsold flats which it can't sell because of*

the need for the works revealed by the EWS to be carried out." The applicant answers: *" It is true that 57 flats remain unsold and that the carrying out of the works will help us. The estimate of £2,500 per flat is based on all flats, including unsold flats contributing to the cost. Land Charter is paying the full amount in respect of each unsold flat. Land Charter (Harlow) Ltd. is offering to pa anything in excess of £250,000 for the 250 flats which will be approximately £375,000 as a gesture of goodwill. That is in recognition of the fact that the works will assist us, but also because we appreciate that paying for the whole cost of the works will be difficult for many lessees."*

24. The Tribunal notes that although this letter is from the managing agent it appears to have been constructed in part at least, by the interested party, the landlord. The total cost for the works appears to be £625,000, of which the managing agent is offering to cap contributions from all flats to £250,000 with the excess paid by the landlord.

25. In their letter dated 4 November 2020 at para 7: *"… the maximum the lessees as a body have to contribute is £250,000, there being 250 flats in total including unsold flats, in the building."* And at para 10: *"… it is likely that the Tribunal will write to each of you telling you of it and inviting your comments before granting any dispensation, if they do, you will be able to raise your concerns with them, though we hope that this letter may have gone some way to explaining the position fully."*

First Respondent's Case

26. The first respondent made representations in their letter of 4 December 2020 in reply to the general posting of the application. However most of this material relates to the nature and justification for these or any particular works, their relative timing, their cost and who should ultimately bear the cost of them. These are matters to bring to the Tribunal later, if a challenge were to be made to these works and the reasonableness and payability of service charges arising.

27. This respondent deals with the issue of dispensation from consultation in their response dated 18 February 2021 to the second Directions. The first respondent notes: *"…that whilst the works have been identified to reduce the risk of spread of fire the risk to residents in its current condition is such that no additional interim measures are required whilst works are undertaken. The key factors relating to this status are that each apartment has an independent sprinkler system, and that there are multiple escape routes in the case of a fire."* And *"…There is no suggestion from this report* (EWS) *that the works were of an urgent nature and required to be carried out without delay. As such I feel that the normal Section 20 consultation process could have been followed. Within their letter of 04 November 2020 issued to residents, the applicant*

appears to put more emphasis that without a valid External Wall Survey (EWS1) report it would be all but impossible for any lessee in the building to sell or re-mortgage their flat. Whilst the applicant is transparent about the number of unsold flats and making payments as a gesture of goodwill in recognition of the fact that the works will assist them selling the remaining unsold flats, as there has not been any prior consultation through the normal Section 20 procedures it has not (been?) *possible to ensure that the costs now being charged to property owners are fair and reasonable."*

Second Respondent's Case

28. Other than complete a standard 'Reply Form for Leaseholders' objecting to the application, confirming that they did not wish attend a hearing and had sent a copy of their response to the applicant, the Tribunal did not receive any further correspondence from this respondent within the applicants bundle.

The Law

29. S.18 (1) of the Act provides that a service charge is an amount payable by a tenant of a dwelling as part of or in addition to the rent, which is payable for services, repairs, maintenance, improvements or insurance or landlord's costs of management, and the whole or part of which varies or may vary according to the costs incurred by the landlord. S.20 provides for the limitation of service charges in the event that the statutory consultation requirements are not met. The consultation requirements apply where the works are qualifying works (as in this case) and only £250 can be recovered from a tenant in respect of such works unless the consultation requirements have either been complied with or dispensed with.

30. Dispensation is dealt with by S.20 ZA of the Act which provides:-
"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."

31. The consultation requirements for qualifying works under qualifying long term agreements are set out in Schedule 3 of the Service Charges (Consultation Requirements) (England) Regulations 2003 as follows:-

1(1) The landlord shall give notice in writing of his intention to carry out qualifying works –

(a) to each tenant; and
(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall –

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
(b) state the landlord's reasons for considering it necessary to carry out the proposed works;
(c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;
(d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure
(e) specify-
(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the period on which the relevant period ends.

2(1) where a notice under paragraph 1 specifies a place and hours for inspection-

(a) the place and hours so specified must be reasonable; and
(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

3. Where, within the relevant period, observations are made in relation to the proposed works or the landlord's estimated expenditure by any tenant or the recognised tenants' association, the landlord shall have regard to those observations.

4. Where the landlord receives observations to which (in accordance with paragraph 3) he is required to have regard, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made state his response to the observations.

Tribunal's Decision

32. The scheme of the provisions is designed to protect the interests of leaseholders and whether it is reasonable to dispense with any particular requirements in an individual case must be considered in relation to the scheme of the provisions and its purpose.

33. The Tribunal must have a cogent reason for dispensing with the consultation requirements, the purpose of which is that leaseholders who may ultimately pay the bill are fully aware of what works are being proposed, the cost thereof and have the opportunity to nominate contractors.

34. The applicant confirms that there were several written and oral representations by the leaseholders immediately after the applicant's letter dated 1 November 2021 to all 'residents', followed by a more detailed and focused response in their letter of 4 November 2021. Many of the concerns dealt with the need for any works, their type, grouping, timing and in particular the final cost to leaseholders.

35. The statements from the applicant and it appears, the landlord/ developer in the background, recognise that the inability for buyers of let and unsold flats to be mortgaged has a major effect on all sales but, in particular for the landlord/developer. Whether this reason is more or less significant than that of continuing fire safety for residents for the urgency of the works and hence the application to dispense is hard to determine.

36. The applicant very clearly re-assures all leaseholders that they would not pay more than £250,000 in total between all 250 leaseholders. They also assure leaseholders that the landlord/developer would instead bear any and all costs beyond this total figure and furthermore, not seek to recharge this to the management company or leaseholders subsequently. Accordingly such assurances made at the time of this application would have dissuaded some, perhaps many leaseholders from making or pursuing existing objections to this application for dispensation. This conclusion is borne out by the contrast between the large number of initial informal objections, compared with there only being one substantive written objection subsequently.

37. The EWS1 report sets out defects they found in the building which meant that fire safety fell below current standards and set out works needed to remedy them. The degree of urgency in the report is not described as very urgent, nor as an emergency, nor requiring a fire watch. However in the view of the Tribunal the grounds supported by the findings and recommendations in the EWS1 are just sufficient, to justify grant of dispensation from the full consultation process under the Act. However such dispensation is only granted on terms to protect leaseholder's

positions from prejudice of limiting the timing and choice of contractor and potential maximum exposure to costs arising and from nearly all leaseholders not pursuing their initial objections any further.

38. The terms of this dispensation are:

39. That all costs of and associated with the making this application and compliance with Directions, will not be borne by the leaseholders. This is because of the repeated and significant failures by the applicant. The applicant employed professional advisors but their failure to comply with the first set of Directions requiring the issue of a further set by the Tribunal, which the applicant again failed to comply fully with. Both sets of Directions clearly set out the consequences of this.

40. That the total sum to be recovered from all 250 leaseholders for all of the subject qualifying works and any variations on them, will not be in excess of £250,000, including fees and all other costs and VAT arising. This is because of the repeated assurances given, to all leaseholders that this cap on cost would be imposed, at the time when any or all of the leaseholders could have objected to this application to the Tribunal but, did not, following these assurances. This condition does not however determine what if any, costs are reasonable and payable by any leaseholder as a service charge.

41. This dispensation does not extend to the cost of applicant's prior commissioning of the EWS1 for the Property. This is because it does not form part of the application.

42. **In making its determination of this application, it does not concern the issue of whether any service charge costs are reasonable or indeed payable by the leaseholders. The Tribunal's determination is limited to this application for dispensation of consultation requirements under S20ZA of the Act; in this case, on terms.**

N Martindale FRICS **26 March 2021**