



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

<b>Case reference</b>	<b>:</b>	<b>LON/00BH/LDC/2021/0174</b>
<b>Property</b>	<b>:</b>	<b>McFadden Court, 25 Buckingham Road, London E10 5GS</b>
<b>Applicant</b>	<b>:</b>	<b>Adriatic Land 5 Ltd</b>
<b>Representative</b>	<b>:</b>	<b>JB Leitch Ltd</b>
<b>Respondents</b>	<b>:</b>	<b>Leaseholders of McFadden Court (list attached to the application)</b>
<b>Type of application</b>	<b>:</b>	<b>Dispensation from statutory consultation requirements</b>
<b>Tribunal</b>	<b>:</b>	<b>Judge Nicol Mr A Fonka</b>
<b>Date of decision</b>	<b>:</b>	<b>2<sup>nd</sup> September 2021</b>

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**DECISION**

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The Tribunal grants the Applicant dispensation from the consultation requirements in relation to the fire safety works to the property at McFadden Court, 25 Buckingham Road, London E10 5GS.

**Reasons**

1. This application for dispensation from statutory consultation requirements under section 20ZA of the Landlord and Tenant Act 1985 has been determined on the papers. A face to face hearing was not held because the Tribunal directed that the case was suitable for the paper track and the parties did not object. The documents that the Tribunal was referred to are in a bundle consisting of 282 pages, the contents of which have been recorded where appropriate below.
2. The Applicant is the freeholder of the subject property, two adjoining 8-storey blocks over 18 metres high. Remus Management Ltd are their agents. The Respondents are the lessees of the 46 flats.

3. The Applicant has applied for dispensation from the statutory consultation requirements in respect of necessary remedial works to the external wall system, due to the discovery of combustible materials posing a risk of fire spread. It relies on various supporting reports, the first of which is dated 28<sup>th</sup> July 2020 from Façade Remedial Consultants ('FRC'), a company retained by the Applicant's managing agent to conduct an intrusive inspection of the external wall system and fixtures, to see whether that system complies with Building Regulations and the Ministry of Housing, Communities and Local Government's Building Safety Guidance ('BSG'). FRC's report identified that remediation works required included (but were not limited to) construction and installation of cavity barriers to the cladding on the third floor south facing elevation, and removal and replacement of a combustible timber substructure to the cladding on the sixth floor south facing elevation.
4. In an holistic fire safety review (report dated 1<sup>st</sup> October 2020) Tri-Fire Ltd ('T-FL') identified that the external wall systems were detrimentally affecting the overall fire safety of the building, and that the presence of combustible insulation in two areas of the cladding system renders the external wall system non-compliant with the BSG ('TFL Report 1'). In particular, the timber used in vertically aligned balconies was not of 'limited combustibility', and a cavity between cladding and aluminium panels at sixth floor level (which system was also combustible) would assist external fire spread.
5. In a fire risk assessment, carried out on 15<sup>th</sup> February 2021 by TF-L, it was reported that the fire risk rating was substantial. In a further holistic fire safety review of the external walls carried out by T-FL (report dated 11<sup>th</sup> February 2021), T-FL concurred with FRC's finding and the findings in TFL Report 1, and made additional recommendations for the removal of all expanding foam ('T-FL Report 2').
6. The works that the Applicant seeks dispensation for are:
  - (a) Removal and disposal of all combustible materials found within the timber decking systems to the balconies/terraces, and of the aluminium cladding system located between the 6th and 7th floor of the two cores of the property (a plan is included with the Applicant's statement of case at annexe G);
  - (b) The design, supply and installation of a replacement cladding system to the affected areas in (a) above, such replacement to meet requirement 64(1) of Building Regulations and achieve European Classification A2 or better.
7. McFadden House has been registered with the Government's Building Safety Fund ('BSF'). The Applicant is seeking the full costs of the remediation, though that request has not yet been considered. Even if the BSF agree that the building qualifies for funding, there are no guarantees that full funding will be granted. The BSF scheme requires works to commence by 30<sup>th</sup> September 2021 (this being the current

extended date; it is not known whether the BSF will once again extend that date).

8. A preliminary quote from Harris Associated Ltd for the provisional sums and contingency of the proposed Works was £45,000. After invitation of tender, of the two lowest quotes it is proposed that AS Ramsay is appointed to undertake the works. The cost identified is £313,621.58 excluding VAT. The contractor will need to be in place to start the works at short notice if the BSF timeframes are to be met. It is proposed that the JCT Design and Build procurement route is followed, as it minimises risk in relation to design, delivery and cost.
9. A consultation process was started in October 2020 and various lessees objected, asserting amongst other things that:
  - (a) The BSF Guidelines required no section 20 consultation;
  - (b) The description of the works was insufficiently detailed so as to deprive the lessees of the possibility of exercising their rights of, for example, nomination of contractors; and
  - (c) the section 20 notice was invalid.
10. The Applicant asserts that the Design and Build route is incompatible with the requirement of consultation under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003. A full consultation now, it is said, would also frustrate compliance with the BSF timescales and lead to a rejection of that application, to the leaseholders' detriment. For that reason, the application is urgent.
11. Under section 20ZA(1) of the Act, the Tribunal may dispense with the statutory consultation requirements if satisfied that it is reasonable to do so. The Supreme Court provided further guidance in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854:
  - (a) Sections 19 to 20ZA of the Act are directed to ensuring that lessees of flats are not required to pay for unnecessary services or services which are provided to a defective standard or to pay more than they should for services which are necessary and provided to an acceptable standard. [42]
  - (b) On that basis, the Tribunal should focus on the extent to which lessees were prejudiced by any failure of the landlord to comply with the consultation requirements. [44]
  - (c) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements, an unconditional dispensation should normally be granted. [45]
  - (d) Dispensation should not be refused just because a landlord has breached the consultation requirements. Adherence to the requirements is a means to an end, not an end in itself, and the dispensing jurisdiction is not a punitive or exemplary exercise. The requirements leave untouched the fact that it is the landlord who decides what works need to be done,

when they are to be done, who they are to be done by and what amount is to be paid for them. [46]

- (e) The financial consequences to a landlord of not granting dispensation and the nature of the landlord are not relevant. [51]
  - (f) Sections 20 and 20ZA were not included for the purpose of transparency or accountability. [52]
  - (g) Whether or not to grant dispensation is not a binary choice as dispensation may be granted on terms. [54, 58, 59]
  - (h) The only prejudice of which a lessee may legitimately complain is that which they would not have suffered if the requirements had been fully complied with but which they would suffer if unconditional dispensation were granted. [65]
  - (i) Although the legal burden of establishing that dispensation should be granted is on the landlord, there is a factual burden on the lessees to show that prejudice has been incurred. [67]
  - (j) Given that the landlord has failed to comply with statutory requirements, the Tribunal should be sympathetic to the lessees. If the lessees raise a credible claim of prejudice, the Tribunal should look to the landlord to rebut it. Any reasonable costs incurred by the lessees in investigating this should be paid by the landlord as a condition of dispensation. [68]
  - (k) The lessees' complaint will normally be that they have not had the opportunity to make representations about the works proposed by the landlord, in which case the lessees should identify what they would have said if they had had the opportunity. [69]
12. The Tribunal is satisfied, on the evidence, that the fire safety needs to be done. Despite the previous objections, however, none of the lessees have objected to the proposed works as allowed for in the Tribunal's directions of 15<sup>th</sup> July 2021, let alone sought to establish that the lack of full consultation had caused them any prejudice.
13. The Tribunal's role at this stage is limited to determining only if the statutory consultation requirements may be dispensed with. As stated in the Tribunal's directions, "This application does not concern the issue of whether any service charge costs will be reasonable or payable."
14. Given the lack of any objection in these proceedings or any evidence of prejudice, the Tribunal has determined that it is reasonable to dispense with the statutory consultation requirements.

**Name:** Judge Nicol

**Date:** 2<sup>nd</sup> September 2021

## **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 Tribunal at the regional office which has been dealing with the case.

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.

If the application is not made within the 28-day time limit, such application must include a request for 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.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).