



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

**Case Reference** : CHI/00MS/LDC/2022/0009

**Property** : Empress Heights, College Street,  
Southampton, SO14 3LA & 3LB

**Applicant** : Empress Heights RTM Company Limited

**Representative** : Muckle LLP  
[Charlotte.mcmurchie@muckle-llp.com](mailto:Charlotte.mcmurchie@muckle-llp.com)

**Respondent** : Mr Lee Harris

**Representative** : -

**Type of Application** : To dispense with the requirement to  
consult lessees about major works section  
20ZA of the Landlord and Tenant Act 1985

**Tribunal Member** : W H Gater FRICS MCI Arb  
Regional Surveyor

**Date of Decision** : 7 March 2022 without a hearing (rule 6A of  
the Tribunal Procedure Rules 2013 as  
amended by The Tribunal Procedure  
(Coronavirus) Amendment Rules 2020 SI  
2020 No 406 L11.

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**DECISION**

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**The Tribunal grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 in respect of the removal of existing cladding, rendering systems sections of facing brickwork and insulation and replacement with new, removal and replacement of existing sections of brickwork to access insulation. The dispensation extends to the appointment of experts in connection with the proposed works, insofar as is**

**necessary to carry out statutory consultation in relation to those appointments, and to contingency works arising in connection with those works.**

**In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

**The Applicant is to send a copy of this decision to each lessee.**

### **Background**

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act. The application was made on 26 January 2022.
2. The purpose of this Application is to remove the requirement for the Applicant to consult with the leaseholders over the proposed works which would take some time and might delay the proposed works. The Applicant states that it has not been possible to consult with the leaseholders because of the requirements of the Building Safety Fund.
3. The Tribunal issued Directions on 7 February 2022 indicating that it was satisfied that the matter is urgent, it is not practicable for there to be a hearing and it is in the interests of justice to make a decision disposing of the proceedings without a hearing (rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11).
4. The Tribunal required the Applicant to serve the Directions and a copy of the application on each of the Respondents together with a form for the Leaseholders to indicate to the Tribunal whether they agreed with or opposed the application. It was indicated that those Leaseholders who agreed with the application or failed to return the form would be removed as Respondents.
5. On 18 February 2022 the Tribunal issued revised directions in response to a case management application by the Applicant. These dealt with the issue of relief from strike out where there had been difficulty in serving documents within specified time limits. Relief from strike out was granted and the case proceeded as directed.
6. The Applicant confirmed on 23 February 2022 that the Tribunal's Directions had been served.
7. The Lessees of 56 flats responded, 55 in agreement and one lessee objecting.
8. Those agreeing and those not replying have been removed as Respondents.

9. In objecting, the Respondent states that he does not agree to the application being dealt with on the papers alone. The Tribunal therefore considered this as a preliminary issue.
10. The papers received were examined to determine whether the issues remained capable of determination without an oral hearing, and it was decided that they were.
11. Rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11 provides that the Tribunal may make a decision which disposes of proceedings without a hearing if it considers that certain conditions are satisfied.
12. The conditions are —
  - a) the matter is urgent;
  - b) it is not reasonably practicable for there to be a hearing (including a hearing where the proceedings would be conducted wholly or partly as video proceedings or audio proceedings); and
  - c) it is in the interests of justice to do so.
13. Given the subject matter of the application and the strictures of the Building Safety Fund the Tribunal is satisfied that the matter is urgent and that it is not reasonably practicable to hold a hearing in those circumstances.
14. Further, as this decision is restricted to dispensation from consultation requirements only and makes no determination of reasonableness or payability of service charges, the Tribunal is satisfied that it is in the interests of justice to expedite the matter without a hearing. The Tribunal reaffirms its decision in directions that the matter shall be determined on the papers.
15. Therefore, the only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. This application is not about the costs of the proposed works, and whether they are recoverable from the leaseholders as service charges. The leaseholders have the right to make a separate application to the Tribunal under section 27A of the Landlord and Tenant Act 1985 to determine the reasonableness of the costs, and the contribution payable through the service charges.

## **The Law**

16. The relevant section of the Act reads as follows:

S.20 ZA Consultation requirements:

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.

17. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson. In summary the Supreme Court noted the following: -

- a) The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
- b) The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
- c) Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
- d) The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).
- e) The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.
- f) The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
- g) The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- h) Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

## **Evidence**

### **The Applicant**

18. The Applicant explains that it proposes to carry out works to the building in connection with the fire safety of the same.
19. A description of the works is given in general terms, as the removal of cladding, rendering systems, sections of facing brickwork and insulation and replacement with new, removal and replacement of existing sections of brickwork to access insulation. A copy of the Planning Statement is attached to the Application marked Appendix 4.
20. The Applicant has pointed out it is mindful of the tragedy at Grenfell Tower and the advice given to owners or managers of multi-storey, multi-occupied residential buildings in connection with fire safety and cladding systems.
21. The Applicant states that the necessary remediation works to the building are exceptionally costly but vital for the safety of the residents and their visitors, and other third parties attending the building. The necessity for the works arises not due to any failings on the part of the Applicant but as a consequence of the construction of the building and updates to the Building Regulations which postdate that construction. Recognising this, the Government put in place a Building Safety Fund programme. This programme exists to provide funding for the works rather than giving the responsibility of raising funds to the leaseholders.
22. The Applicant applied to the Building Safety Fund for funding for the full costs of the Proposed Works including the costs of the Experts. This application was made on 29th June 2020. Confirmation that the full funding application for approximately £11,000,000 had been successful was received on 10 January 2022 and a copy of this confirmation is attached to the Application marked Appendix 8. Since receiving this confirmation the Applicant has been advised that the back stop date for the works beginning on site is the 28 February 2022. This date must be met in order to remain within the terms of the full funding agreement.
23. Because of the requirements of the Building Safety Fund application, it has not been possible for the Applicant to carry out any formal consultation with the Respondents pursuant to s.20 of the Commonhold and Leasehold Reform Act 2003 (CLRA 2003). However, the Applicant has regularly kept the Leaseholders up to date with developments and progress of the Building Safety Fund application from the inception of the cladding remediation project. Further details are found in the Applicant's statement of case.

24. The Applicant invites the Tribunal to make a determination to dispense with the consultation requirements in relation to the Proposed Works. The Application is made prospectively if a determination is made before a contract is entered into with Lawtech or before costs are incurred pursuant to such a contract, and if not, then the application is made retrospectively.
25. In so far as is necessary to carry out statutory consultation in relation to the appointment of all or any of the Experts in connection with the Proposed Works, and without admitting that consultation is required, the Applicant invites the Tribunal to make a determination to dispense with the consultation requirements in relation to the appointment of experts.
26. The Applicant understands from its Experts that there may be works necessitated by the Proposed Works which have not been included in the Specification. This is not an oversight on the part of those advising the Applicant but simply the Applicant having an eye to contingencies arising on the remediation project. In so far as it is necessary to carry out statutory consultation in relation to the Contingent Works, and without admitting that consultation is required, the Applicant invites the Tribunal to make a determination to dispense with the consultation requirements in relation to the Contingent Works prospectively.
27. The Proposed Works are scheduled to commence in late January 2022 with the set-up of the site. Physical works (excluding scaffolding erection) are scheduled to commence on 28th February 2022
28. A more detailed explanation is set out in the Application form and attachments.
29. The Applicant also states that the Respondents would not suffer “relevant prejudice” (in the sense of the Supreme Court’s decision in *Daejan v Benson* 2013); The Bailey Partnership report of 13 May 2021 evidences that the estimate from Lawtech is not an unreasonable amount and that the standard of Lawtech’s work is known to be of a good standard.

### **The Respondent**

30. The Respondent disagrees with dispensation of the legal right to consult.
31. He further disagrees with entering into an arrangement whereby he may be responsible for open-ended costs.
32. This is a complex matter, arising from construction of the building some 10 years ago and 5 years after the Grenfell Tragedy.
33. He states that he would expect completeness and consultation to be more important than urgency - if this is an urgent works why was it not actioned years ago?

34. He states that this matter is not so urgent (having lived with the situation for a decade) as to dispense with consultation.
35. It is appropriate and just to produce by way of schedule the agreed/proposed costs and whom shall be ultimately responsible for said costs.
36. He also states that there was insufficient time to deal with the documentation issued with the application and to seek legal advice.
37. The Respondent seeks an order dismissing the application.
38. The Respondent states that he is prepared to agree the Application on receipt of an undertaking that no resident of Empress Heights will be charged for the proposed works, or costs associated with them.

### **The Applicants response to the Respondents submissions.**

39. The Applicants disagree that the matter is not urgent and consider that compliance with Building Safety Fund time limits restricts exposure of the lessees to the risk of financial loss as well as the risk of the consequences of a fire.
40. In relation to costs the Applicant considers that lack of consultation has been to the advantage of lessees. As the scope is understood, no costs will be met by leaseholders.
41. The Applicants consider that an agreed schedule of costs is not a matter for this application which is restricted to dispensation only.
42. The Applicant considers the time frame directed by the Tribunal is reasonable.

### **Determination**

43. Dispensation from the consultation requirements of S.20 of the Act may be given where the Tribunal is satisfied that it is reasonable to dispense with those requirements. Guidance on how such power may be exercised is provided by the leading case of Daejan v Benson referred to above.
44. The Tribunal has considered the objection made by the Respondent. The test in Daejan is that real prejudice to the Respondent should occur as a consequence of dispensing with consultation.
45. The urgency of the matter dictates that limited time is available for representations, but the Tribunal finds that the time allotted is adequate and in the interests of justice.
46. Granting dispensation does not commit the Respondent to open ended costs and it may be argued that timely compliance with Building Safety Fund time limits will reduce exposure to costs considerably, if not entirely.

47. The Respondent has not demonstrated that he will suffer prejudice to satisfy the Daejan test.
48. The Tribunal accepts that contingency work does on occasion become apparent during the course of a contract and that it is not practical to carry out a further consultation exercise given the inevitable delays that such consultation will incur and the urgency of the matter.
49. For this reason, the Tribunal grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 in respect of the removal of existing cladding, rendering systems sections of facing brickwork and insulation and replacement with new, removal and replacement of existing sections of brickwork to access insulation. The dispensation extends to the appointment of experts in connection with the proposed works, insofar as is necessary to carry out statutory consultation in relation to those appointments, and to contingency works arising in connection with these works.
- 50. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**
- 51. The Applicant is to send a copy of this decision to each lessee.**



## **RIGHTS OF APPEAL**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to [rpsouthern@justice.gov.uk](mailto:rpsouthern@justice.gov.uk) to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.