FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HP/LDC/2019/0028
Property	:	Moriconium Quay, Lake Avenue, Poole, Dorset BH15 4QP
Applicant	:	Moriconium Quay Management Company Limited
Representative	:	Napier Management Services Limited
Respondent	:	None
Representative	:	
Type of Application	:	To dispense with the requirement to consult lessees about major works
Tribunal Member(s)	:	Mr D Banfield FRICS
Date of Decision	:	20 May 2019

The Tribunal grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 for emergency remedial works to stabilise the retaining wall.

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

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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 Landlord and Tenant Act 1985.

2. The Applicant refers to a report entitled "Moriconium Quay Marina Wall Project" dated March 2019 in which reference is made to structural movement of the marina wall at the Property.

3. The Tribunal made Directions on 3 April 2019 requiring the Applicant to send a copy of the application and the Tribunal's Directions to each lessee. Attached to the Directions was a form for the lessees to return to the Tribunal indicating whether the application was agreed with, whether a written statement was to be sent to the applicant and whether an oral hearing was required.

4. The Directions noted that those parties not returning the form and those agreeing to the application would be removed as Respondents.

5. The development includes properties on both freehold and leasehold tenures and in the application, all were referred to as "tenants" and were served with the Tribunal's Directions as referred to above.

6. One reply objecting to the application was received from the owners of freehold house number 7. The applicant asserts in their letter of 30 April 2019 that as freeholders they have no right to make representations.

7. In their Statement of Case the house owners confirm that they are freeholders and that the Tribunal's jurisdiction is in respect of leasehold properties only.

8. The Tribunal agrees that its jurisdiction is in respect of leasehold property only and it must follow therefore that owners of freehold interests cannot be "respondents". Their statement of case and the applicant's responses have however been included in the bundle and will therefore be read by the Tribunal before making its determination.

9. No lessees have returned the response forms and they have therefore been removed as Respondents as previously indicated.

10. Letters have been received from two lessees requesting the Tribunal to grant consent as a matter of urgency.

11. No requests have been received for an oral hearing and the application is therefore determined on the papers received in accordance with Rule 31 of the Tribunal's procedural rules.

12. The only issue for the Tribunal is if it is reasonable to dispense with any statutory consultation requirements. **This decision does not concern the issue of whether any service charge costs will be reasonable or payable.**

The Law

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

    20ZA Consultation requirements:

    a. (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.

14. 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

    b. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
    c. 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.
    d. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
    e. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
    f. 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).
    g. 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.
    h. 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.
    i. 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.

j. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

15. A bundle extending to some 311 pages has been submitted which contains the reports of Groundsolve Limited Geotechnical Engineers, Baypoint Surveyors and John Berry Marine Engineer together with various other reports and correspondence. The survey dated 1 April 2019 from Baypoint surveys refers to the large movement noted being due to the failure of the capping beam and quay wall.

16. A number of undated photographs are also included showing the damage to the walkway.

17. At page 191 onwards are extracts from the Board's Newsletters from January to October 2018 setting out in some detail the measures they were taking or proposed to take in dealing with the problem.

18. A Notice of Intention to Carry Out Qualifying Works dated 21 October 2018 was sent to lessees in which the description of the works was given as "Remedial works to the inner marina retaining wall and associated communal gardens, drainage and walkways"

19. In a letter from Napiers dated 30 April 2019 the extent of the work for which dispensation is sought was clarified as "does not include the reinstatement of the gardens affected, but solely relates to the repairs required to the wall itself. When the movement to the wall has been fully addressed, a full S20 consultation will be carried out for the remedial works"

20. From the executive summary of the "Summary of Events and Findings" at page 67 of the bundle the works are described as the immediate installation of six piles in the worst affected areas to provide temporary support and a further eighteen piles which will ultimately provide sufficient support to stop the wall moving further.

21. The application is to obtain dispensation from Serving Notice number 2 which enables lessees to put forward their own nomination of contractors.

22. In their response to the application the freeholders of House 7 refer to the complex structure of ownerships on the estate and the 14 separate service charge accounts. They say that the problem has been ongoing since 2013 and they consider that with the installation of "10 large very large steel tubes and RSJs" there is no emergency.

23. They consider that the works are a matter for the shareholders to decide and are concerned that in their haste the board prejudice further work required but not yet mentioned in the documents circulated.

24. Their further concern is that if the application is approved the board will interpret it as an opportunity to carry out a series of related projects at a cost in excess of £1,000,000.

25. In summary the freeholders ask that application is rejected for the following reasons;

    - This work is to land and structure that is outside of the scope of the said Act
    - The costs of this work will be born (sic) by the freeholders & leaseholders and as such is beyond the jurisdiction of the tribunal.
    - These works should be approved by the shareholders, who are also the landlord, at a general meeting.
    - The emergency has since passed with the shoring up of the Walkway.

26. In the alternative;

    - The dispensation to be limited to the emergency work carried out in March/April.

27. In a reply dated 30 April 2019 Napiers confirm the application is in respect of repairs to the wall only following which a full S20 consultation will be carried out. Although the rate of movement has reduced the wall is still moving after the installation of the temporary piles and the sea continues to remove "garden material". They rely on specialist advice.

28. Their purchase of materials and use of their chosen contractor is more cost effective due to the limited availability of contractors with the specialist machinery required.

Determination

29. The Tribunal's decision solely relates to whether dispensation from consultation is justified. It does not determine the amount, if any, of service charge payable. Whilst the Freeholders of House 7 raise the question of the Tribunal's jurisdiction I am satisfied that it is likely that a proportion of the cost of these works will eventually be levied on leaseholders and as such I am accepting jurisdiction for the Tribunal.

30. This application relates to emergency works to stabilise the wall by insertion of piles. Some have been fixed and the applicant reports that movement is continuing albeit at a reduced rate. This is confirmed by Baypoint's brief report of 1 April 2019.

31. I am satisfied that the insertion of these piles should be completed as a matter of urgency and that it is not appropriate to delay matters by requiring full consultation to be carried out.

32. I am also satisfied that given the specialist nature of the works involved and the need to avoid the distance travelled by heavy plant that it is reasonable not to have to tender the works the subject of this application.

33. I do not consider that the lessees will suffer the type of prejudice referred to in the Daejan case referred to above.

34. In granting dispensation from the consultation requirements of section 20 landlord and Tenant Act 1985 I emphasise that this is in respect of the emergency works only and that any further reinstatement works should be subject to full consultation.

35. **In accordance with the above the Tribunal grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 for emergency remedial works to stabilise the retaining wall.**

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

D Banfield FRICS
20 May 2019

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case. 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.

2. 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.

3. 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 appeal is seeking.