FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AH/LDC/2020/0111**
Property	**:**	**53 Whytecliffe South Road, Purley, Surrey CR8 2AZ**
Applicant	**:**	**Optivo Ltd**
Representative	**:**	**Mr C Brewin of counsel**
Respondents	**:**	**The leaseholders named on the application**
Representative	**:**	**Ms Y Mosse (Flat 36)**
Type of application	**:**	**For the dispensation of some of the consultation requirements under s.20 Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge Simon Brilliant** **Mr Stephen Mason BSc FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**21 September 2020** **(Virtual Hearing)**
Date of decision	**:**	**25 September 2020**

DECISION

Decision of the Tribunal

The Tribunal determines that those parts of the consultation requirements provided for by s.20 of the Landlord and Tenant Act 1985 ("the Act") which have not been complied with are to be dispensed with.

The application

1. The Applicant seeks a determination pursuant to s.20ZA of the Act for the dispensation of all or any of the consultation requirements provided for by s.20 of the Act. The application was dated 18 May 2020. The only issue for the Tribunal is whether 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.**

2. Directions of the Tribunal were issued on 31 July 2020.

The hearing

3. Mr C Brewin appeared for the Applicant. Also present were (a) his instructing solicitor, Mr S Olaniyan, (b) Ms C Brooks (the Applicant's Property Manager) and (c) Ms H Langside (the Applicant's Director of Asset Compliance).

4. Objections to the application had been received from Mr T Battens (Flat 36), Mr R Navarro and Ms K O'Donovan (Flat 45), and Ms Davison (Flat 46). These objections are set out in detail below after the Applicant's case has been set out.

5. In the event, only Ms Y Mosse, who is Mr Batten's partner and the joint lessee of Flat 36, participated in the hearing.

6. The hearing was conducted virtually using the CVP Platform. The technology worked well, apart from the very end when in the closing submissions of the Applicant contact was lost with Mr Brewin. Mr Olaniyan then stepped into Mr Brewin's shoes for a few minutes.

7. It was possible thanks to the assistance of all the parties apart from this one loss of contact to have a full and properly conducted hearing. The Tribunal was provided with a virtual hearing bundle of 214 pages.

8. The directions did not provide for either party to make witness statements. However, the notice of application did contain a statement of truth.

9. We allowed Ms Mosse to ask questions of Mr Brewin. Understandably, they were in the main directed to the reasonableness and payability of the service charge costs, rather than to the matter in hand, namely the question of dispensation from the statutory requirements.

10. Otherwise, the hearing was conducted on the basis of submissions. No witnesses were called to give live evidence. In fact, Ms Mosse felt that she had said everything she wished to in her questioning of Mr Brewin and did not make any further submissions.

The background

11. The premises consist of a purpose-built block dating from 2010 with 19 residential shared ownership flats, surrounded by similar blocks with under croft parking ("the premises"). The maximum height of the building is estimated to be less than 18 metres. The works which are the subject matter of these proceedings flow from the discovery that the cladding on the buildings on the estate was unsafe and opposed a fire safety hazard to residents.

12. In his objection Mr Battens correctly pointed out that Applicant had been using the wrong postcode for the premises. It is the corrected postcode which appears on the heading of this decision

The Applicants' case

13. In outline, the Applicant wrote to the leaseholders on 1 and 17 April 2020 regarding the proposed works. The application was said to be urgent because the works involved interim fire safety measures. Ms Mosse said that she had not received the letter of 17 April 2020. Mr Brewin did not dispute this. Nevertheless, we do not consider that the non-receipt affects the merits of this application.

14. According to the application the defective cladding has only recently been discovered. The initial emergency need for an improved fire detection and warning system was addressed by the introduction of a waking watch service. The waking watch service involves relatively high and recurring costs. The temporary common alarm system, which is the subject of this application, will provide, at a much lower one off cost, a proper safety system in place of a waking watch service, or in addition to a reduced waking watch service, and so mitigate the costs of interim fire safety measures pending permanent remedial works.

15. At the beginning of the hearing, the Tribunal was told by Mr Brewin that the estimated cost of the waking watch in April 2020 had been £85,000 per month. By June 2020 this figure had decreased to £16,000 per month, although it might rise.

16. We were also told by Mr Brewin that although the fire alarm system is in place, there was still a reduced waking watch because there was one disabled leaseholder in the premises who might need physically to be moved in the event of a fire. It is possible that a second person might also need such help. The Applicant will in due course have to give careful thought about this aspect of its policy. It is not for us, of course, at this stage to form any view as to the reasonableness of such a system as this.

17. The full grounds, which had been settled by leading and junior Counsel include the following arguments.

18. The application is very urgent because it involves interim fire safety measures due to defective cladding and other defects that pose a fire safety hazard. The defective cladding was only recently discovered. The initial emergency need for improved fire detection and warning system was addressed by the introduction of a waking watch service.

19. The waking watch service involves a relatively high and recurring cost. The temporary common alarm system the subject of this application will provide, at a much lower one off cost, a proper safety system in place of a waking

watch service (or in addition to a reduced waking watch service) and so mitigate the costs of interim fire safety measures pending permanent remedial works.

20. The advice the Applicant has received from external fire safety consultants is that the permanent remedial works will take a minimum of 8 months from the date of the practical commencement of works, in addition to a minimum of 4 months prior to commencement if planning permission is not required (and 8 months if it is).

21. All the leases are in substantially the same material form and terms. Part 7 obliges the leaseholder to pay service charge as a proportion of expenditure to be incurred by the Applicant in performance of its covenants in section 5 in connection with a repair, management, maintenance and provision of services as otherwise set out in the lease.

22. The Applicant received a report from FR Consultants Ltd ("FRC") dated 4 March 2020, and on 24 March 2020 advice by email from its external fire safety consultants, Savills, concluding that fire safety at the premises was inadequate and immediate interim measures were required, with a waking watch to be in place as soon as reasonably practicable. The advice was further confirmed in writing by letter dated 1 May 2020 and by email dated 13 May 2020.

23. Of the six areas sampled and subjected to intrusive inspection, FRC found three areas including combustible insulation and insufficiently fire resisting external cladding panels. While at the time of construction these would have been considered adequate under the advisory provisions of Part B of the Building Regulations then in force, they are now considered unsuitable and require replacement.

24. In order to provide an acceptable level of confidence in the fire integrity of the buildings it is necessary to remove and replace the rain screen cladding system which currently presents an undue fire risk. Pending re-cladding works, the safety message to occupiers has been changed from 'stay put' to 'evacuate'. The interim measures recommended to achieve this involve provision of a waking watch, and fire detection and alarm, or fire detection and alarm only. The specific measure(s) necessary and the extent of provision appropriate depends on the development and its occupants.

25. The installation of a temporary alarm as an interim measure is preferable to waking watches in that it is an automatic-mechanical system that does not have to rely on a person and that it can reduce the need for high numbers of waking watch officers. The level of waking watch provision required following the installation of an alarm is based on a number of factors, including: the building height and configuration; the number of residents that cannot self-evacuate; and the number and location of flats where detection and alarms have not been installed.

26. This is in accordance with the Ministry of Housing, Communities & Local Government: Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings issued in January 2020, section 11. It is also consistent with the Guidance of the National Fire Chiefs' Council to support a temporary change to a simultaneous evacuation strategy in purpose built blocks of flats, issued on 2 October 2017 and updated on 1 May 2018, at paragraph 4.3, which

recommends a common fire alarm system. On 25 March 2020, the guidance was updated to take Covid-19 into consideration.

27. A waking watch has been in place at the premises since 9 April 2020, involving people on site for 24 hours a day, at a cost of £84,620 per month. The costs of the waking watch are fixed for three months, during which time the Applicant is seeking alternative service providers (if necessary) to ensure value for money. The market for waking watch provision is unregulated, and the Applicant's priority at the start of April, with the added complications caused by Covid-19, was to obtain a service on site to address the immediate risk and one in which residents could have confidence.

28. As we have said the costs in August 2020 had reduced to £16,000 per month.

29. The Applicant wrote to all residents on 1 April 2020 offering assistance in the preparation of a personal evacuation plan or a person centred fire risk assessment but had no requests for assistance in response.

30. The qualifying works involve installing a temporary common automatic fire detection and alarm system, to sense fire within all individual flats or communal areas and to alert all residents, in accordance with the National Fire Chiefs' Council Guidance to support a temporary change to a simultaneous evacuation strategy. The Applicant has now installed the system.

31. The temporary common automatic fire detection and alarm system requires access to every dwelling to install equipment, although the system itself operates wirelessly. Once permanent re-cladding works have been carried out, the system will no longer be required and could be re-used at other locations, potentially reducing the ultimate cost of the system overall.

32. Whereas the watch prior to the installation of the fire alarm system incurred a recurring monthly charge of £84,620 per month, the cost of the alarm system is a one-off charge of £69,777 (excluding marginal ongoing testing and maintenance charges) with the potential to offset some of the initial cost against reuse in other locations.

33. Accordingly, even over a short period of time the alarm system reduces costs significantly, and the reduction will increase exponentially should there be a prolonged procurement exercise or the timely completion of works within the anticipated timeframe of between 12 and 16 months be frustrated. This might be the case given the pressure on the supply and fitting of appropriate re-cladding by reason of the current high demand which may be increased further by Covid-19.

34. Once the alarm system is operational (as has now happened), ongoing testing and maintenance costs will be minimal regardless of the time taken to programme re-cladding. Testing will cost £16 per week per installation.

35. Savills have prepared four anticipated scenarios illustrating the cost benefit analysis and potential for cost reductions. The point to be made is that cost reductions should result whichever permutation is selected.

36. On 1 April 2020, the Applicant wrote to all Respondents informing them of the planned work to the buildings, including the installation of a temporary

common alarm system. Amongst other matters, the Respondents were asked to confirm whether they required assistance to evacuate.

37. On 17 April 2020, the Applicant wrote again to all Respondents, notifying them of the works and anticipated costs. It appears that Mr Battens and Ms Mosse at Flat 36 did not receive this letter.

38. The real thrust of the Applicant's argument is that there is no relevant financial prejudice to the Respondents in failing to follow the consultation requirements, in line with Daejan Investments Limited v Benson and others [2013] UKSC 14. If formal consultation had been undertaken there would have been a delay in installation of the temporary common alarm system, and the monthly cost of interim fire safety measures (a waking watch) would have been much higher.

39. The Applicant makes extensive use of framework agreements for its service contracts for active fire management, procured via the South East Consortium. This ensures the Applicant has no difficulty in producing contracts for alarm installation with whom it has a successful track record after a competitive tendering process. Most importantly, it ensures value for money.

The Respondents' case

40. At the hearing Ms Mosse argued in place of Mr Battens, her co-owner of Flat 36. In his written objection, Mr Battens says that he has no idea of how much he might have to contribute towards the cost of the alarm system. The Applicant has provided an overall cost, totalling to an amount of £68,811.55, however no indication of the exact split per leaseholder has been provided. It is completely implausible to agree to enter into a dispensation agreement with the Applicant when no indication of the exact costs is provided. In no instance in life would one buy something without knowing how much it will be costing.

41. He does not understand how or why the Respondents were not consulted about the costings before the alarm system was fitted inside their flats. How can this process be deemed 'fair' if the alarm system was fitted before details of costings were provided? Furthermore, if the Applicant had acted speedily like several blocks of flats in England have already done so and completed the remediation works of the cladding, would the Respondents even require this new fire alarm system and the additional costs it might incur?

42. At no stage was an opportunity provided to give input into the consultations for the works. Having bought his flat in 2015, clearly before knowing about the cladding issue, he was completely unaware this situation would arise. Now, from completely no fault of his own he is potentially facing what potentially may be a large and realistically unaffordable contribution. How can this be deemed reasonable? Has the Applicant done all that it can as the building owners to protect him as a leaseholder the burden of additional costs?

43. Mr Navarro and Ms Donovan (Flat 45) object for the following reasons. First, they have requested the estimates the Applicant has obtained for the works, but these have not yet been received. Secondly, they have asked for a breakdown of the costs per household, and this has not been received. Thirdly, they have recently purchased their flat and during the process of purchasing,

they were not informed of these upcoming works. The most detailed report from FRC was carried out on 24th January 2020 stating the critical works and cladding issues. The couple were still in the process of purchasing this property and did not complete until 6th March 2020. Fourthly, the decisions to have the waking watch were made without consulting the leaseholders and there has been no confirmation as to who is responsible to cover this cost.

44. The concern of Ms Davison (Flat 46) is although the fire alarm system is now active, the waking watch system is still in place. The purpose of the fire alarm system was to replace the waking watch, but that has not been the case so far. She does not see why both systems are still required. As we have said above, we have been told that this is because there is still a resident who will need physical assistance if there is a fire.

The Applicant's response

45. The relevant test the Tribunal has to consider is whether there is relevant financial prejudice to leaseholders in failing to follow consultation requirements, in line with Daejan Investments Limited v Benson and others [2013] UKSC 14. In the Applicant's grounds for seeking dispensation it was noted that if formal consultation were to be undertaken there would be a delay in installation of the temporary common alarm system, and the monthly cost of interim fire safety measures (a waking watch) would be much higher.

46. It follows that a large number of the points made by the Respondents are not directly relevant to this application.

47. While the legal burden of proof in relation to dispensation applications is on the landlord, the factual burden of identifying some "relevant" prejudice that leaseholders would or might suffer is on leaseholders. Leaseholders must show a credible case for prejudice (Daejan,[67-68].

48. Had there been a consultation process the leaseholders would have been given an opportunity to nominate a contractor from whom an estimate should be sought. A complaint made by the leaseholders is that they were denied this opportunity.

49. Although the statutory process was not followed, the Applicant did communicate with the Respondents by sending the letters on 1 and 17 April 2020. The information in those letters included the following: (a) the Applicant estimated the cost of the alarm installation works would be £72,000; (b) the Applicant estimated that the costs of the remedial works to replace the cladding could exceed £1,300,000 plus VAT; and (c) the costs of waking watch for the block were estimated to be approximately £69,730.00 plus VAT per month and for the estate to be approximately £14,890 plus VAT per month (with the estate service costs being spread across all flats within 53, 55, 57 and 59 Whytecliffe Road and with those costs reducing once the use of the car park was suspended).

49. The letter dated 17 April 2020 also gave an explanation why the Applicant considered it beneficial to carry out the works without following the statutory procedure. It is therefore incorrect to say the leaseholders were not given notification of the costs before the work was carried out.

50. Insofar as it is contended the residents were not consulted about the

waking watch, the Applicant refers to its letter of 1 April 2020 which explained why the need for the waking watch arose. The Applicant also refers to the information provided by its external fire safety consultants, Savills in their report dated 13 May 2020 in which it is stated: "The waking watch service has been drawn down from a fully compliant OJEU framework. The charge of the waking watch is calculated by assessing the size of the resource required to meet the building's characteristics rather than simply height and the number of units." The Applicant has followed expert advice in relation to the imposition of a waking watch and it has consulted residents to ensure the provision of a waking watch meets the requirements set out in accordance with the relevant guidelines.

51. The Applicant also contends that no prejudice was caused due to the consultation requirements not being followed, not only due to the fact that it saved the expense of the waking watch, but also because the Applicant followed a rigourous procedure to ensure a suitably qualified contractor was appointed at a competitive cost. Taking this into account, the Applicant considers that the leaseholders could not realistically show that their input and/or any other steps in the consultation process could have resulted in a better outcome.

52. The Applicant obtained two quotations. In addition to the quotation from Fire Systems Ltd, an additional quotation was obtained from Allied Protection Ltd. Both companies were provided with the specification recommended by Savills.

53. Both Fire Systems Limited and Allied Protection Limited are approved suppliers of the Applicant. This means that they have both passed a thorough and rigorous selection process to ensure that are capable of providing a value for money service, whilst at the same time ensuring they are able to demonstrate satisfactory adherence to a various other important requirements, such as professional competence and integrity, probity, proficiency and competency in their field and in carrying out the works required of them. They are also required to confirm and evidence that they have sufficient policies and procedures in place governing matters such as Customer Care, Health and Safety, Equality and Diversity, Modern Slavery, Environmental matters, Data Protection and Probity. They are also BAFE accredited.

54. Through obtaining two quotations from reputable suppliers, the Applicant was able to act quickly, ensuring that works were capable of being carried out swiftly by competent suppliers to ensure value for money. Moreover, formal consultation would not have made any difference in this instance in any event. There is no relevant financial prejudice because the Respondents are not saying they would have nominated contractors from whom the Applicant could have sought an alternative estimate.

55. The Applicant refutes the contention that it did not act speedily in addressing cladding remedial works like many other flats in England. The Applicant also disagrees that the costs of the alarm system could have been avoided had it acted sooner.

56. Immediately following the Grenfell tragedy the Applicant reacted promptly and identified and remediated blocks over 18m with ACM cladding as guided by the Ministry of Housing, Communities and Local Government. The

Applicant also followed the guidance in MHCLG Advice note 14 issued on 18 December 2018 for external wall systems that did not contain ACM and the supplementary Advice Note 22– Use of High Pressure Laminate Panels in external wall systems issued on 18 July 2019. All of these advice notes were applicable to buildings over 18m.

57. It was not until the MHCLG Consolidated Advice note issued on 20 January 2020 that building owners were obliged to assess and manage the risk of external fire spread for all buildings of any height, including building less than 18m in height such as Whytecliffe Road.

58. Thereafter the Applicant has acted swiftly. An intrusive survey was carried out by a FRC on 24 January 2020. Their report following the survey was prepared on 4 March 2020. After that, advice was received from the Applicant's external safety consultants (Savills) on 24 March that the strategy should change from stay put to simultaneous evacuation and that a waking watch should be installed until an alarm system was installed or the cladding removed. The Applicant put in place a waking watch on Monday 6 April 2020 and submitted this application for dispensation on 19 May 2020. Works commenced on installing the alarm system on 25 May 2020. It is therefore incorrect to say that this application was made after the alarm system was installed.

59. Consultation may take a number of months, because:

- 20.1. Leaseholders have 30 days (plus a few days to ensure receipt) to respond to a notice of intention served at the pre-tender stage.
- 20.2. If a contractor is nominated, that contractor may need to be invited to tender.
- 20.3. If a tender is submitted the landlord has to check whether the contractor is able to meet necessary criteria to carry out the works. The Applicant's processes in obtaining quotes from two suitably qualified approved suppliers avoids this issue and delays it creates in ensuing compliance.
- There must be time spent having regard to observations from leaseholders. Landlords must make a summary of the observations and responses to the notice of intention, which must be sent to leaseholders with the notice of the landlord's proposals or statement of estimates.
- Leaseholders then have a further 30 days to respond to the notice of the landlord's proposals.

60. The Applicant has, at all times, sought to act in the best interests of the leaseholders, taking into account the importance of the works, the potential costs and the benefits of acting swiftly.

61. The Applicant consulted extensively with external experts and legal advisers (including Counsel) to ensure the correct steps were taken and to make sure complete and comprehensive information was available to enable the Applicant to decide on the options and to submit this application. For much of the period after the advice was received from Savills, the Applicant's operations

were affected by COVID-19. Quotations were nonetheless obtained from two competent and experienced suppliers who were both able to provide quotations and commit to carrying out the works swiftly.

62. The contractors have acted swiftly in carrying out the works from 25 May 2020. The Applicant and its contractors worked diligently to address the issues that arose in terms of there being a delay in gaining access to all the flats. As a result, the final commissioning certificate was issued on 20 August 2020. The Applicant is now seeking to confirm the number of residents who need assistance to self-evacuate and their location in the building before it can fully determine whether the waking watch service can be removed completely or partially.

63. By commencing the works swiftly in May 2020, the Applicant avoided delaying the commencement of the works to accommodate the steps set out above. Had the commencement date of the works been delayed to comply with those requirements, achieving the commissioning certificate could have been delayed beyond 20 August 2020 by the extra period of time it would have taken to comply with those steps. This would have made the overall costs far more expensive, given that the monthly waking watch costs for the correct level of service without the fire alarm being operational would in May 2020 have risen to a figure in the region of £85,000 per month.

64. Many of the points made by the Respondents are not relevant to this application. For example, and (d) a failure by sellers of flat disclose the problems with the cladding during the process of purchase.

Discussion

64. As we were at pains to emphasise during the hearing, this application is very limited in its scope. It is solely to determine whether any prejudice has been suffered by the Respondents by the Applicant failing to comply with the consultation requirements.

65. The Respondents will have every opportunity in due course to question (a) the apportionment of the costs between the various lessees, (b) whether the costs are payable at all under the service charge provisions in the lease, (c) whether cost of the works is reasonable and (d) whether the work has been carried out to a reasonable standard.

66. If it is to be alleged that the seller of any flat failed to disclose the problems with the cladding during the purchase process, this is a matter which must be pursued in the County Court not in the Tribunal. It must be remembered, however, that the premises are not a high-rise block, and Government advice in respect of such buildings post-dated the advice given in respect of high-rise blocks.

67. We are satisfied on all the evidence that the Respondents have been unable to demonstrate any prejudice to them, or any of them, as a result of the failure to comply with the consultation requirements. On the contrary, as Mr Brewin succinctly pointed out, the Respondents would have been prejudiced if the consultation procedures had been complied with.

68. Despite having every sympathy for the Respondents, the Tribunal is satisfied that, in the particular circumstances of this case, it is reasonable to dispense with the consultation requirements of the works.

68. Finally, it is yet again emphasised that the Tribunal's determination is limited to this application for dispensation of consultation requirements under section 20ZA of the Act.

Name: Simon Brilliant **Date:** 25 September 2020

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).