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

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| **Case Reference** | : | **CAM/00KA/LDC/2020/0029** |
| **Property** | : | 146 Midland Road, Luton, Beds LU2 0BL |
| **Applicant** | : | Henley Homes RF Ltd |
| **Representative** | : | Mirkwood Evans Vincent Solicitors |
| **Respondents** | : | All long lessees of flats at the above block, as listed on the application |
| **Type of Application** | : | for dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 [LTA 1985, s.20ZA] |
| **Tribunal** | : | Tribunal Judge G K Sinclair |
| **Date of determination** | : | 15th January 2021 |

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DECISION
following a determination on the papers

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1. On 9th October 2020 Luton Borough Council, the relevant local housing authority, served on the freeholder an improvement notice under section 11 of the Housing Act 2004 identifying certain Category 1 hazards and requiring *inter alia* the removal of polystyrene covered render insulation and category 3 aluminium composite material (ACM) cladding panels from the external walls of the building and their replacement in accordance with current Building Regulations with materials complying with Euro Class A1 or A2-s1.

2. On 12th October 2020 Bedfordshire Fire and Rescue Service served upon the freeholder two enforcement notices under Article 30(1) of the Regulatory Reform

(Fire Safety) Order 2005. The first required the imposition of a 24 hour "waking watch" at the premises in order to ensure the safety of residential occupants and the second required installation of a fire detection and alarm system.

3. This application, dated 12th November 2020, seeks dispensation of some or all of the statutory consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 and subsidiary legislation concerning some or all of the above. There is no linked application under section 27A for determination of the reasonableness of the cost of any urgent major works carried out or to be carried out at the property. As made clear by introductory paragraph (3) of the tribunal's directions issued by Deputy Regional Judge Wyatt dated 25th November 2020 the only issue requiring determination is whether it is reasonable to dispense with the statutory consultation requirements. It does not concern whether any service charge costs will be reasonable or payable.

4. On the above basis, but with a degree of hesitation given the background, this tribunal is prepared to grant dispensation from the need to consult lessees under section 20 but on the following condition, namely that if an application is later brought under section 27A seeking determination of the reasonableness of the cost of works required then :
   a. If the lessees collectively, or a majority of them, seek to challenge the proposed costs
   b. The freeholder shall reimburse the fees properly incurred by them for a suitably qualified chartered surveyor or fire safety expert selected by such majority in connection with the physical inspection of the property and preparation of a detailed expert report, answering relevant questions upon it and attendance (if required) at any substantive tribunal hearing.

**Background**

5. In its detailed statement of case produced in compliance with paragraph 3(a)(ii) of the tribunal's directions order the applicant freeholder explains the background to the development of this part-commercial but now mainly residential block in central Luton, but the history is incomplete.

6. Originally constructed in the 1930s as a three-storey commercial building, in 2005 planning consent was obtained to convert the top two storeys for residential use and add another four storeys on top, creating 39 one-bedroom flats in total. Who precisely was responsible for the development is unclear, but the tribunal notes that the work was completed by 2008 and each of the flats was soon let on a 125-year lease by Henley Homes (Southern) Ltd, which suggests that it may be an associated company of the current applicant and freeholder and thus that the 2018 transfer was not conducted as a normal arm's length transaction with due diligence undertaken prior to assumption of legal responsibility for the condition of the building.

7. Paragraph 6 of its statement of case merely states that the applicant acquired the freehold in 2018.

8. Following an inspection by Luton housing officers a section 11 improvement notice was served on the applicant on 9th October 2020. No attempt seems to have been made to appeal the notice, on the grounds of inadequacy of timings or

otherwise, bearing in mind the need for statutory consultation about the very major works involved in recladding the exterior of the building. The applicant has instead chosen to rely upon this section 20ZA application alone.

9. Following its separate inspection Bedfordshire Fire and Rescue Service served two enforcement notices on the applicant. Each provided that the recipient may request an extension of time for completion of the required works. In each case this was sought. That for installation of a "waking watch" was refused, while that for commencement of the work for installation of an effective fire detection system etc was granted. No attempt was made to appeal either notice.

10. A "waking watch" was duly implemented, currently at the applicant' expense, and many of the more minor or simpler tasks required by the various notices (such as the installation of a gas supply isolator valve) have already been undertaken. Installation of a fire detection and alarm system may be well underway, but the current position is unclear. Subject to correction, the tribunal's understanding is that the "waking watch" is intended only as a temporary measure pending the installation of a proper fire detection and alarm system; not the replacement of the exterior cladding. Whether its continued provision requires consultation in respect of "long term agreements" is therefore a moot point.

11. Also worth recording is the fact that the applicant has applied for government grant assistance for the cladding works. Whether this includes any financial help with the cost of the "waking watch" is unclear, but the department has accepted the application. The extent and timing of any available assistance (the overall fund having been capped) will no doubt emerge in due course..

**Evidence**

12. In compliance with the tribunal's directions the applicant has filed and served on the lessees a more detailed statement of case to which are exhibited copies of the various notices and, at Annex E, a detailed schedule setting out what works are required. The applicant later filed and served an updated schedule, which set out what had now been completed, timetables, and likely costs.

13. Although only to confirm the respective parties' liabilities, a sample lease for flat 603 was included in the application bundle. The lessor's maintenance obligations concerning the main structure, etc appear in clause 7 and Schedule 4; the lessee's service charge covenants in clause 3.

14. The applicant also includes a selection of correspondence with various lessees following service of the information available to it. The tribunal notes from this that a limited amount of work concerning exterior lightning protection will be (or has been) undertaken entirely at the freeholder's expense and not as a service charge item.

15. The lessees filed their own small bundle of documents. This largely raises the questions of cost, lack of time for consultation, and whether the grant of a "waking watch" contract to a connected company may give rise for concern. The bundle also includes a copy of a London tribunal decision which also goes into some detail on the reasonableness of costs in that specific case. These are really issues for another day, requiring evidence that such work could have been done

by others at more favourable overall cost if proper consultation and tendering had been undertaken.

**Discussion**

16. Apart from the applicant's lack of understanding of its appeal rights under Part 1 of the Housing Act 2004 and (initially) its right to apply under section 20ZA the tribunal cannot really fault the applicant's managing agents's actions in trying to respond constructively in particular to the two enforcement notices served by Bedfordshire Fire and Rescue Service. Implementation of an immediate "waking watch" was insisted upon and alternative quotes were obtained. There was no time for consultation under the 1985 Act. The applicant went with the cheaper one. Steps have been taken to speed the installation of a working fire detection and alarm system, and this should – on the tribunal's current understanding – curtail the need to provide that temporary service once it is operational.

17. Where the tribunal expresses concern is about the period between the Grenfell fire in June 2017 and the pre-enforcement inspections undertaken by the various authorities in late 2020. The fire was a wake-up call to every property owner about the potential dangers inherent in certain types of insulating cladding. Not once in the applicant's statement of case is there any mention of investigations or reports undertaken either by the then freeholder or by the applicant, prior to taking on responsibility for the building in 2018. That, surely, was the time at which due diligence should have been exercised and the incoming freeholder learn what liabilities it might be taking on. A surveyor's report at that stage could have started a chain of enquiry and sharing of information with lessees of the flats who, under their service charge provisions, might suddenly find themselves liable for a substantial financial commitment. Buildings insurers and lenders may also have wished to comment and/or impose binding commitments.

18. All this time was wasted, and yet not by other responsible building owners. The applicant could at this early stage have commenced statutory consultation, long before strict deadlines were imposed by regulators. It is for this reason that the tribunal is prepared to dispense with the section 20 consultation requirements only on condition that, in any subsequent application concerning reasonableness and payability of service charges, the applicant be responsible for meeting the costs incurred by a majority of the leaseholders in obtaining professional advice and assistance from a suitably qualified chartered building surveyor or fire safety expert – such to include the cost of inspection, report, answering questions and attendance at any tribunal hearing.

Dated 15th January 2021

Graham Sinclair, First-tier Tribunal Judge