



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

Case Reference : CHI/29UL/LDC/2021/0074

Property : St Andrews, The Durlocks, Folkestone,
Kent CT19 6AW

Applicant : St Andrews Folkestone Limited

Representative : Smith Woolley

Respondent :

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(s) : D Banfield FRICS
Regional Surveyor

Date of Decision : 14 September 2021

DECISION

The Tribunal refuses to grant the dispensation requested.

**The Applicant is to send a copy of this determination to all
of the lessees liable to contribute to service charges.**

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 explains that in the course of installing a new alarm system, asbestos was discovered in some the walls and ceilings in communal areas. A letter from KH Asbestos Investigations Ltd dated 21 July 2021 confirms this and states that ceiling voids should be subjected to a “localised environmental clean” and broken boarding must be removed. The letter does not explicitly state that such works are urgent or that all the asbestos must be removed. Rather, it states that the asbestos must be managed by mandatory inspection every six months.
3. A Stage 1 Consultation Notice has been sent to the leaseholders. This is dated 26 July 2021. It is stated that the works “will consist of the replacement of the asbestos noted in the report from KH Asbestos”. On the face of it, this would not appear to marry up with the work recommended by KH Asbestos.
4. The application to the Tribunal states that the matter is urgent but does not explain why, or why dispensation is requested. Although the Tribunal understands that in some situations the presence of asbestos may require urgent action, the need for urgency has not yet been explained in this case.
5. The Tribunal made Directions on 13 August 2021 indicating that it considered that the application was suitable to be determined on the papers without a hearing in accordance with Rule 31 of the Tribunal Procedure Rules 2013 unless a party objected.
6. The Directions required the Applicant to send them together with a copy of the application to each Respondent.
7. Included with the Directions was a form for the Leaseholders to indicate to the Tribunal whether they agreed with or opposed the application and whether they requested an oral hearing. Those Leaseholders who agreed with the application or failed to return the form would be removed as Respondents.
8. Replies were received from 16 lessees representing 18 flats all of whom agreed with the application. The lessees have therefore been removed as Respondents in accordance with the paragraph above.
9. No requests for an oral hearing were made and the matter is therefore determined on the papers in accordance with Rule 31 of the Tribunal’s Procedural Rules.

10. Before making this determination, 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, given that the application remained unchallenged.
11. The only issue for the Tribunal is whether 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

12. 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.

13. 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
 - i. 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.
 - ii. 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.
 - iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
 - iv. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
 - v. 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).
 - vi. 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.

- vii. 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.
- viii. 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.
- ix. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

- 14. Despite the inconsistencies in the information provided with the Application identified in Judge Morrison’s Directions no clarification has been received. The Tribunal must therefore make its determination on the information already received.

Determination

- 15. 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.
- 16. Unlike the Daejan case this application is prospective and in order to satisfy the Tribunal that dispensation should be granted some explanation as to why full consultation could not be exercised would be expected. As Judge Morrison has indicated, the report from the asbestos specialists does not require urgent action to be undertaken.
- 17. Despite the clear indication that further information as to urgency was required none has been forthcoming and as such, on the evidence provided, I am not satisfied that the need for dispensation has been demonstrated.
- 18. **The Tribunal therefore refuses to grant the dispensation requested.**
- 19. **The Applicant is to send a copy of this determination to all of the lessees liable to contribute to service charges.**

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 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.