FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference:	**LON/00BJ/LDC/2020/0234 P**
HMCTS code:	**P: PAPERREMOTE**
Property:	**Sesame Apartments, 4 Holman Road, London SW11 3PG**
Applicant:	**Adriatic Land 3 Limited**
Representative :	**Irwin Mitchell**
Respondents:	**The 81 leaseholders of Sesame Apartments**
Representative:	**Blake Morgan LLP**
Type of Application:	**To dispense with the statutory consultation requirements under section 20ZA Landlord and Tenant Act 1985**
Tribunal members:	**Judge Pittaway** **Ms S Coughlin MCIEH**
Date of decision:	**8 February 2021**

DECISION AND FURTHER DIRECTION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the applicant and not objected to by any respondent. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because no-one requested a hearing and all issues could be determined on paper.

The documents to which the tribunal was referred are in an electronic bundles of 249 pages (consisting of the application, the Directions issued by the tribunal dated 4 December 2020, the applicant's statement of case dated 20 November 2020, the respondents' statement in response dated 18 December 2020, the applicant's statement in reply dated 8 January 2021 and copy correspondence dated 18 November, 7, 11 and 17 December 2020 and 8 January 2021).

In addition, the tribunal were provided with an e mail from Blake Morgan solicitors dated 18 December 2020 attaching a schedule of the leaseholders it represents, and certain of the letters referred to above. The tribunal also received a late evidence submission from Blake Morgan dated 14 January 2021 and a response from JB Leitch dated 18 January 2021.

The tribunal's decision is set out below.

References to sections are to sections in the Landlord and Tenant Act 1985, unless otherwise stated.

DECISION

The Tribunal grants the application for dispensation from statutory consultation in respect of the subject works, namely (a) removal and replacement of ACM cladding, the glazed curtain walling, the specialist Linit Glazing, the window infill panels and other combustible elements of the external façade and (b) the incorporation of suitable protection to cavities subject to the applicant paying the respondents' reasonable legal costs, limited to costs incurred in connection with the present application under section 20 ZA of the Landlord and Tenant Act 1985.

The costs of the applicant in connection with the present application under section 20 ZA of the Landlord and Tenant Act 1985 should not be regarded as

relevant costs to be taken into account in the service charge payable by the respondents.

This decision does not affect the Tribunal's jurisdiction upon any future application to make a determination under section 27A of the Act in respect of the reasonableness and/or the cost of the work.

The applicant should, within seven days of receipt of this decision send a copy of this decision by e mail, hand delivery or first class post to each of the respondents and display a copy in a prominent position in the common parts of the Property, together with an explanation of the leaseholders' appeal rights.

The parties are referred to the further direction in paragraph 27 below.

The Application

1. The Applicant seeks a determination pursuant to section 20ZA of the Landlord and Tenant Act 1985 ("the **Act**") for retrospective dispensation from consultation in respect of works to the Property. These are described in the applicant's statement of case as **(**a) removal and replacement of ACM cladding, the glazed curtain walling, the specialist Linit Glazing, the window infill panels and other combustible elements of the external façade and (b) the incorporation of suitable protection to cavities' (the **'works**').

2. The Service Charges (Consultation Requirements) Regulations 2003 provide that consultation requirements are triggered if the landlord plans to carry out qualifying works which would result in the contribution of any tenant being more than £250. The total cost of the works is in excess of £3,500,000 + VAT.

3. By directions dated 4 December 2020 (the "**directions**") the tribunal directed the applicant send each of the leaseholders the application, the applicant's statement of case and the tribunal's directions, confirming to the tribunal that it had done so. The applicant confirmed to the tribunal on 11 December that the application, statement of case and directions had been sent to each leaseholder on 10 and 11 December 2020, a hard copy placed at the concierge's desk and notices placed in commonly accessed areas at the property.

4. The directions required that any leaseholder who opposed the application should tell the tribunal and the applicant by 18 December 2020. They should also send the tribunal and the applicant a statement responding to the application together with any

documents they wished to rely on. The only response received by the tribunal is that from Blake Morgan dated 18 December 2020.

5. The directions provided that the tribunal would decide the matter on the basis of written submissions unless any party requested a hearing. No such request has been made.

The applicant's case

6. Adriatic Land 3 Limited is the freeholder of the property and is described in the application as the respondents' landlord. In the application the applicant described the property as a 9-storey residential tower block (including a basement) with 81 apartments on floors 1 to 7, a youth club on the ground, first and second floors and a transformer chamber on the ground floor. In the specimen lease provided the lessees covenant to pay the Service Charge, which includes the cost to the applicant of 'maintaining running repairing renewing rebuilding replacing cleansing draining emptying lighting cleaning and redecorating the Common Parts the Retained Elements and any other structural parts of the Building.

7. The applicant obtained a report from Thomasons dated 12 August 2019 on the required fire safety works to the property. The report contained recommendations with regard to the external cladding and internal compartmentation. The applicant's agent, London Residential Management Limited ('**LRM**'), issued Section 20 stage 1 notices in respect of the works to the respondents on 27 July 2020 and stage 2 notices to the respondents on 13 October 2020. The latter notices did not include a schedule of all estimates received nor did it specify where and when the estimates might be inspected by the respondents. J B Leitch, in its letter of 18 January 2021 stated that the Applicant had had regard to the responses received from the leaseholders.

8. The applicant considers the works to be urgent. Thomasons' report stated that the exterior of the property posed a significant health and safety risk to the residents of the property. The London Borough of Wandsworth served a Preliminary Notice on the applicants dated 23 September 2020 requiring it to commence the works no later than 30 November 2020. Wandworth have not responded to a request from the applicant of 7 October 2020 to extend the date by which the works should be commenced. If the applicants recommenced the consultation process again it would cause significant delays to essential works.

9. The applicant states, in its statement of case, that the cost of a large portion of the works is eligible for funding via the private Sector ACM Cladding Remediation Fund, which is administered by MHCLG. MHCLG stated to the applicant that the current funding agreement had to be accepted by the applicant by 20 November 2020 or

funding would not be available from the fund and would have to be recovered from the tenants by way of service charge. MHCLG also required the contractors to be on site by 31 December 2020.

10. It is the applicant's contention that the respondents are not prejudiced by the administrative errors (which it describes as minor) in the Section 20 stage 1 and stage 2 notices issued. It referred the tribunal to the decision in *Daejan Investments Ltd v Benson and others* and the need for the tribunal to focus on whether the tenants are prejudiced by the failure to comply with the section 20ZA requirements.

11. The applicant had obtained six quotes for the works by 8 September 2020. It considered that those of Lawtech Group (£3,448,360.26 excluding VAT) and Bell Building (£3,448.595.82 excluding VAT) to be the most suitable being the cheapest and available to commence the works soonest. After taking into account Fire Engineering PII, the cost of a performance bond and post tender clarification adjustments these quotes were adjusted to £3,528,806.26 excluding VAT and £3,544,515.82 excluding VAT respectively.

The Respondents' case

12. By a letter dated 18 December 2020 Blake Morgan confirmed that it was acting for the leaseholders listed in the schedule attached to that letter, being the leaseholders of 69 flats at the property (the '**Represented Leaseholders')**. In that letter it confirmed that the Represented Leaseholders do not oppose the application for dispensation but requested that any dispensation be conditional upon
    (a) the applicant paying the Represented Leaseholders' legal costs relating to the incorrect section 20 notices and the section 20ZA application. The Represented Leaseholders had made representations on the section 20 notices and had incurred legal costs in doing so.
    (b) the applicant's costs of the application to the tribunal not being recoverable by it from the respondents by way of service charge; and
    (c) the applicant being obliged to have regard to the observations and reservations previously made on behalf of the Represented Leaseholders, as set out in the letter dated 18 November 2020.

The Applicant's reply

13. In response to the request in relation to legal costs the applicant submitted that the representations made by the Represented Leaseholders in relation to the Notices of Intention (some of which had not been made within time) did not alter or change the position and did not show that the Represented Leaseholders had suffered prejudice as a result of the inaccuracies in the consultation process. The applicant should not have to pay the legal costs incurred in seeking legal advice on receipt of the

notices. Insofar as legal costs incurred in connection with the dispensation application are concerned as the Represented Leaseholders are not resisting the dispensation application it would be inappropriate to make the dispensation subject to a condition that the applicant pay the Represented Respondents' legal costs in relation to the application.

14. In relation to the applicant's costs the applicant submits that in relation to the dispensation application no actual section 20C application has been made. It however confirms that it has no intention of recovering the costs of the application through the service charge.

15. Insofar as dispensation being conditional on having regard to observations made by the Represented Leaseholders the applicant submits that this is inappropriate as there is no dispute in relation to dispensation. Further the Represented Leaseholders have not set out how regard has not been had to their observations, given that the landlord is not required to go further than have regard to observations. It is submitted that the applicant has complied with the spirit of the consultation process.

Determination and Reasons

16. Section 20ZA(1) of the Act provides:

> "*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 purpose of section 20ZA is to permit a landlord to dispense with the consultation requirements of section 20 of the Act if the tribunal is satisfied that it is reasonable for them to be dispensed with. Such an application may be made retrospectively, as it would appear to have been made here, at least in relation to some of the work.

18. The response from the Represented Leaseholders (being the only response received) expressly states that the Represented Leaseholders agree the necessity of the works and do not oppose the application, although they have requested that conditions be attached to the dispensation. In the absence of any opposition to the application, and noting that the Represented Leaseholders agree as to the necessity of the works, the tribunal determine, having regard to the decision in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 ('***Daejan***'), that the tenants are not prejudiced by the proposed works and it is reasonable to dispense with the consultation requirements.

19. The tribunal have considered the conditions requested by the Represented leaseholders.

20. The first condition sought by the Represented Leaseholders is that the applicant pays the Represented Leaseholders' legal costs relating to the incorrect section 20 notices and the section 20ZA application.

21. The Tribunal has taken account the decision in *Daejan* in relation to this request. Paragraph 59 of *Daejan* gives the tribunal the power to impose a condition as to costs; '*I also consider that the LVT would have power to impose a condition as to costs – eg that the landlord pays the tenants' reasonable legal costs incurred in connection with the landlord's application under section 20ZA (1).'* Paragraph 64 states '*…in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence.'*

22. In light of the decision in *Daejan* the tribunal are prepared to make it a condition of its decision that the applicant pay the respondents' reasonable professional costs incurred in connection with the section 20ZA application. The respondents should note that this condition is limited to costs incurred in connection with the Section 20ZA application; it does not include any costs incurred in connection with the service of the section 20 notices, nor costs incurred in advising from whom the costs of the works may be recovered. These are matters which fall outside the jurisdiction of the tribunal in relation to this present application.

23. The second condition sought by the Represented Leaseholders is that the tribunal order that the costs incurred by the applicant should not be passed onto the respondents, Section 20C(1) of the Act provides that, *'A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a [First-tier Tribunal] ……. are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application".*

24. The tribunal note that the applicant has stated that it does not intend to pass these costs onto the respondents. Given that the application is necessary by reason of the applicant having not complied with the relevant consultation requirements of section 20 of the Act the tribunal considers it just and equitable that the costs incurred by the applicant in connection with the proceedings before the tribunal should not be regarded as relevant costs to be taken into account in the service charge payable by the respondents.

25. The final condition requested was that the applicant should be obliged to have regard to the observations and reservations previously made on behalf of the Represented Leaseholders, as set out in the letter dated 18 November 2020. The tribunal accept the applicant's submission, in its statement of case in reply, that this is not an appropriate

condition to attach to the dispensation where it is not disputed that the dispensation be granted.

26. Who is ultimately liable for the cost of the works, and whether the works have been carried out to a reasonable standard and at a reasonable cost are not matters which fall within the jurisdiction of the tribunal in relation to this present application. This decision does not affect the tribunal's jurisdiction upon any future application to make a determination under section 27A of the Act in respect of the reasonableness and /or cost of the works.

Further Direction

27. The tribunal notes that the application does not expressly refer to the works to the Envirowall render wall constructions (the '**Envirowall Works**'), although these are referred to in the Thomasons' report. The tribunal DIRECTS that within 14 days of the date of this determination the respondents confirm to the applicant whether or not they consider that the Envirowall Works are included in the works the subject of this dispensation, so that the applicant can consider whether it is necessary to make a separate application to the tribunal for dispensation from consultation in relation to such works.

Name: Judge Pittaway Date: 8 February 2021

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.