FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/OOCJ/LDC/2021/0087**
Property	**:**	**Thomas Bewick House, Thomas Bewick Street, Newcastle-upon-Tyne, NE1 5EJ**
Applicant	**:**	**UK Ground Rent Estates (2) Limited**
Representative	**:**	**Kingston Property Services Limited**
1st Respondent	**:**	**Adriatic Land 1 (GR3) Limited**
Representative	**:**	**J B Leitch Limited**
2nd Respondent	:	**Greenan Blueaye Limited**
Representative	:	**Muckle LLP**
Respondents	:	**various leaseholders**
Type of application	:	**s.20ZA of the Landlord and Tenant Act 1985**
Tribunal members	:	**Judge P Forster** **Mr. J Gallagher MRICS**

DECISION

Decision

Compliance with the consultation requirements of s.20 of the Landlord and Tenant Act 1985 is dispensed with in relation to the supply, erection and maintenance of a fan scaffold around the Property including netting the top lift and the provision of an alarm system around the whole length of the top lift.

Background

1. This is an application under s.20ZA of the Landlord and Tenant Act 1985 ("the Act") to dispense with the consultation requirements of s.20 of the Act. These requirements ("the consultation requirements") are set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations").

2. The application is made in respect of Thomas Bewick House, Thomas Bewick Street, Newcastle-upon-Tyne, NE1 5EJ ("the Property"). The Property is a seven storey building containing eighteen apartments and one commercial unit.

3. The Applicant, UK Ground Rent Estates (2) Ltd., formerly known as Adderstone Developments (Stock 2) Ltd., owns the freehold of the Property which is registered at HM Land Registry under title number TY342082.

4. Two leases were granted from the freehold title. The Head Lease is dated 6 August 2004 and is for a term of 999 years from 6 August 2004. The Head Lease is of part of the ground floor, first, second, third, fourth and fifth floors of the Property. It is of the majority of the Property and contains the eighteen apartments as well as the entrance halls on the ground floor. The 1st Respondent, Adriatic Land 1 (GR3) Ltd., is the Tenant under the Head Lease. Its title is registered at HM Land Registry under title number TY422225.

5. There are eighteen individual leases granted out of the Head Lease representing the eighteen residential apartments in the Property.

6. The second lease granted from the freehold title is of part of the ground floor and lower ground floor of the Property. This is a commercial unit within the Property. The lease is dated 20 December 2018. The 2nd Respondent, Greenan Blueaye Ltd., is the Leasee.

7. The only issue for the Tribunal to determine is whether it is reasonable to dispense with the consultation requirements.

8. The proposed works are "qualifying works" within the meaning of section 20ZA(2) of the Act.

9. The Tribunal issued directions on 3 May 2022. It considered that the application could be resolved by way of submission of written evidence but invited any of the parties to apply for hearing if so desired. No such application has been made and the Tribunal therefore convened on the date of this decision to consider the application in the absence of the parties. The directions included at paragraph 5 a provision that required the Applicant to write to each of the Respondents informing them of the application and providing them with information about the application process. Paragraph 6 provided that any respondents who oppose the application were to submit written representations to the Tribunal. Paragraph 7 allowed the Applicant to submit a final written statement in reply before the Tribunal makes its determination.

Grounds for the application

10. The Applicant's case is that the works are urgently required to prevent loose stonework and debris from falling from the Property and potentially causing injury to residents and members of the public walking below. The Property is in a prominent location in the centre of Newcastle with a public house at the lower level and a significant footfall from members of the public who walk past.

11. The Applicant relies on a report from a stonemason, S V Rutter, which identifies significant spalling of the stonework with the potential of detachment. The installation of fan scaffolding is intended to prevent any falling debris from posing a danger to anyone below pending consultation about further works to be undertaken.

12. The Applicant asks the Tribunal to grant dispensation in respect of the works, which it considers to be so urgent as to warrant avoiding the additional delay that compliance with the consultation requirements would entail.

13. In its final statement, the Applicant clarifies the works to be undertaken. This is in response to points raised by the Respondents. The works are "to supply, erect and maintain a fan scaffold around the building including netting the top lift and to provide an alarm system around the whole length of the top lift to identify any intruders". The scope of the works is set out in a letter dated 16 June 2022 from S V Rutter.

Responses to the application

The 1st Respondent

14. The 1st Respondent initially made an application to the Tribunal for further directions, seeking clarification of the scope of the works and asking for evidence to support the need for the works. There was some confusion because the original application was amended but the original rather than the amended application was issued to the respondents. These matters have now been addressed.

15. Having considered the application, the 1st Respondent is prepared to consent to the dispensation from the consultation requirements "as regards to the supply, errection and maintenance of a fan scaffold around the building including netting the top lift and to provide an alarm system around the whole length of the top lift to identify any intruders", but subject to a number of conditions. Although the 1st Respondent submits that the application amounts to "prejudice" as identified in Daejan Investments Ltd. v Benson [2013] UKSC 14, it recognises the need for urgent steps to be taken to prevent injury.

16. The 1st Respondent limits its consent to the matters within the application. It does not accept that it is contractually liable to pay any demand for costs associated with the works. Nor does it accept that any costs will satisfy the requirements of s.19, Landlord and Tenant Act 1985.

17. The 1st Respondent's conditions are that the Tribunal defines the scope of the works covered by the dispensation and that there is no "catch all" provision for additional works which may subsequently be required. The 1st Respondent asks for conditions to be attached to the dispensation: (1) that the Applicant pays the 1st Respondent's costs in connection with the application in the sum of £2,000 inclusive of VAT, (2) that the Applicant to provide the 1st Respondent with a copy of any contract already entered into for the works and (3) that the Applicant provide the 1st Respondent with an explanation of what steps it has taken or is taking to require third parties to contribute to the costs of the works. The 1st Respondent asks for orders under s.20C of the Act and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

The 2nd Respondent

18. The 2nd Respondent initially opposed the application on the grounds that the Applicant had failed to explain the extent of the works and to substantiate that the works are required urgently. The 2nd Respondent now accepts that the Applicant has clarified matters and in particular the extent of the dispensation application. The 2nd Respondent consents to the application on the proviso that the conditions set out by the 1st Respondent are incorporated into the

dispensation order. The 2nd Respondent states that its costs are £3,000 exclusive of VAT.

The Residents' Association

19. The Residents' Association states that it represents the interests of the individual leaseholders. It looks for clarity about the scope of the works because it appears to cover both the fan scaffolding and "the actual works". The Association focuses its comments on the costs of the works. It states that since 2017 the Applicant has collected over £220,000 in relation to the s.20 works but has not yet carried out "a single aspect of the works". The Association says that delay in the commencement of the works has resulted in further deterioration. It is said that the Applicant has failed to collect any money from the commercial leaseholder. The Association claims that the Applicant's failure to start the works has increased the costs to the leaseholders.

20. The Association has provided several photographs of the exterior of the Property showing tables and chairs set out on the pavement outside the pub which occupies the lower part of the building. It is said that there is no evidence of any fallen debris and disputes the need to carry out any urgent safety works. The leaseholders represented by the Association while accepting the need to protect the public expresses the view that the works will add "to the endless costs…without achieving any meaningful outcomes".

The Law

21. Section 18 of the Act defines what is meant by "service charge". It also defines the expression "relevant costs" as:

> *the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*

22. Section 19 of the Act limits the amount of any relevant costs which may be included in a service charge to costs which are reasonably incurred, and section 20(1) provides:

> *Where this section applies to any qualifying works … the relevant contributions of tenants are limited … unless the consultation requirements have been either– (a) complied with in relation to the works … or*
> *(b) dispensed with in relation to the works … by the appropriate tribunal.*

23. "Qualifying works" for this purpose are works on a building or any other premises (section 20ZA(2) of the Act), and section 20 applies to qualifying works if relevant costs incurred in carrying out the works exceed an amount which results in the relevant contribution of any tenant being more than £250.00 (section 20(3) of the Act and regulation 6 of the Regulations).

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

> *Where an application is made to the appropriate Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works … the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.*

25. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to:

- give written notice of its intention to carry out qualifying works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the works should be sought.

- obtain estimates for carrying out the works, and supply leaseholders with a statement setting out, as regards at least two of those estimates, the amount specified as the estimated cost of the proposed works, together with a summary of any initial observations made by leaseholders.

- make all the estimates available for inspection; invite leaseholders to make observations about them; and then to have regard to those observations.

- give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder if that is not the person who submitted the lowest estimate.

Reasons for the decision

Dispensation

26. Tribunal must decide whether it is reasonable for the works to proceed without the Applicant first complying in full with the s.20 consultation requirements. These requirements ensure that tenants are provided with the opportunity to know about the works, the reason for the works being undertaken, and the estimated cost of those works. Importantly, it also provides tenants with the

opportunity to provide general observations and nominations for possible contractors. The landlord must have regard to those observations and nominations.

27. The consultation requirements are intended to ensure a degree of transparency and accountability when a landlord decides to undertake qualifying works. It is reasonable that the consultation requirements should be complied with unless there are good reasons for dispensing with all or any of them on the facts of a particular case.

28. It follows that, for the Tribunal to decide whether it was reasonable to dispense with the consultation requirements, there needs to be a good reason why the works should and could not be delayed. In considering this, the Tribunal must consider the prejudice that is caused to tenants by not undertaking the full consultation while balancing this against the risks posed to tenants by not taking swift remedial action. The balance is likely to be tipped in favour of dispensation in a case in which there was an urgent need for remedial or preventative action, or where all the leaseholders consent to the grant of a dispensation.

29. The 1st and 2nd Respondents at first opposed the application because of a lack of clarity in the extent of the dispensation requested. The Applicant has now described the works in precise terms and the 1st and 2nd Respondents both now consent to a dispensation order, subject to a number of conditions, and they accept that the works are urgently needed. The Applicants description of the works as set out in its final statement are not disputed.

30. The Residents' Association says that it is also looking for clarity, but it still maintains its opposition to the application principally on grounds of the costs and the Applicant's delay in getting on with the major works to the Property. The Association does not accept that the works need to be done because there is no evidence that anything has yet fallen from the building. The Tribunal takes a very different view about the safety of people walking past below. On the evidence, it is more by luck than anything else that no one has been injured. Matters were first brought to the Applicant's attention as long ago as 2016 and it is surprising that no remedial works have been undertaken to date. One of the situations that might commend the grant of dispensation is the need to undertake emergency works. As time goes by, the works to this Property become more urgent.

31. As a matter of context and the wording of the statute, the financial effect of the grant or refusal of dispensation is an irrelevant consideration for the Tribunal when it exercises its discretion under s.20ZA(1). The Tribunal's power is to dispense with the consultation requirements and not with the financial consequences of non-compliance.

32. There is much criticism of the Applicant because of the delay in getting on with the works and arguments about who is liable to pay for them. These are not matters for the Tribunal when considering dispensation. A landlord may obtain dispensation even if it has not acted reasonably because the reasonableness of the landlord's conduct is not a condition or precedent for an order for dispensation.

33. In the present case there is no doubt that the works are necessary and pressing for the occupiers of the apartments and for those who pass beneath its walls. The Tribunal finds that it is reasonable for the works to proceed without the Applicant first complying in full with the s.20 consultation requirements. The balance of prejudice favours permitting such works to proceed without further delay.

34. It is important to be clear about the scope of the works that are subject to the dispensation and not to allow what the 1st Respondent describes as a "catch up" provision to cover any additional works that may be required.

Conditions

35. The 1st and 2nd Respondents give their consent to a dispensation order subject to a number of conditions which they ask the Tribunal to impose. These are set out in the 1st Respondent's final statement and above at paragraph 17.

36. The 1st and 2nd Respondents say that they are entitled to seek their costs incurred as a result of the Applicant's application for dispensation. They say that such costs are a necessary and obvious consequence of a landlord seeking permission to bypass their statutory rights as set out in Daejan Investments at paragraphs 59-64 and 73.

37. It is true that in Daejan Investments Lord Neuberger spoke of dispensation being conditional on the landlord paying the tenants' reasonable costs 'incurred in connection with the landlord's application under section 20ZA(1)' (paragraph 59) and 'in connection of investigating and challenging that application' (paragraph 73). Taken in isolation, those passages lend weight to the 1st Respondent's submission. However, in a subsequent case, Aster Communities v Kerry Chapman & Ors [2021] EWCA Civ 660 it was stated that the First-tier Tribunal was in effect proceeding on the basis that the potential prejudice to the tenants remained to be addressed, with any future s.27A application providing a forum for the investigation into prejudice which might otherwise have been undertaken in the context of the dispensation application.

38. Lord Neuberger recognised that "the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be described should not be regarded as representing rigid rules' (paragraph 41) and that the Tribunal 'has power to grant a dispensation on such terms as it

thinks fit — provided, of course, that any such terms are appropriate in their nature and their effect' (paragraph 54).

39. The question of the costs incurred in respect of the dispensation application need to be considered in all the circumstances of the present case. There is a history of previous applications to the Tribunal, a current s.27A application, and the prospect of further litigation about who should pay for and the reasonableness of the costs of the major works. Daejan Investments is not authority for the proposition that it must likely follow that the Applicant will be required to pay the Respondents' costs. The Respondents have not put forward any argument to support their claim for costs other than simply relying on Daejan Investments. The Tribunal concludes that it would not be reasonable to subject the dispensation order to a condition that the Applicant pays the Respondents' costs.

40. There is no application for an order for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Such an application would have to be based on unreasonable behaviour and there are no submissions on this point nor has the Tribunal evidence to concluded that a party has acted unreasonably.

41. The 1st and 2nd Respondents wish to impose a condition that the Applicant provide them with a copy of any contract already entered into for the works. It is submitted that this will "further the position to establish the reasonability of the costs associated with these works being incurred". The Respondents will of course still have the opportunity to question the recoverability and reasonableness of the costs in due course once the works have been completed. The Tribunal does not consider that it is reasonable to imposes the condition sought by the 1st and 2nd Respondents on the dispensation of the consultation requirements because the works need to be done urgently now and such would not promote this objective.

42. The 1st and 2nd Respondents seek to impose a condition that Applicant provide them with an explanation of what steps it has taken or is taking to require third parties to contribute to the costs of the works. Reference is made to two authorities, Continental Property Ventures Inc v White [2007] L.& T.R.4; and Avon Ground Rents Ltd v Cowley [2019] EWCA Civ 182, where it was held that for costs to be "reasonably incurred" the landlord must give credit for actual or anticipated monies which could be received from third parties. Underlying the dispute in this case is the issue of who should pay for the major works to the Property and by implication the liability of the lessee under the 2018 Lease. The Tribunal concludes that it would not be reasonable to impose the condition sought by the 1st and 2nd Respondents because it is not immediately relevant to issue at hand, namely the need to get the works done urgently.

43. The Tribunal would emphasise the fact that it has solely determined the question of whether or not it is reasonable to grant dispensation from the consultation

requirements. This decision should not be taken as an indication that the Tribunal considers that the amount of the anticipated service charges resulting from the works is likely to be recoverable or reasonable; or, indeed, that such charges will be payable by the Respondents. The Tribunal makes no findings in that regard and, should they desire to do so, the parties will retain the right to make an application to the Tribunal under s.27A of the Landlord & Tenant Act 1985 as to the recoverability of the costs incurred, as service charges.

Dispensation order

44. The Tribunal determines that compliance with the consultation requirements of s.20 of the Landlord and Tenant Act 1985 is dispensed with in relation to the supply, erection and maintenance of a fan scaffold around the Property including netting the top lift and the provision of an alarm system around the whole length of the top lift.

S.20(1)C of the Act and para 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002

45. The 1st and 2nd Respondents apply for an order pursuant to s.20(1)C of the Act and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, which would prevent the Applicant from charging any of its legal or professional costs incurred in respect of the dispensation application. They say this is common practice within dispensation applications, relying on Daejan Investments (paragraph 73).

46. The Tribunal has a wide discretion under s.20(1)C of the Act and under paragraph 5A of Schedule 11 of 2002 Act. It must look at all the circumstances and do what is just and equitable. The question of the costs incurred in respect of the dispensation application need to be considered in the light of all the circumstances of the particular case.

47. Daejan Investments is referred to above. In that case, the Court determined that the Respondents had suffered significant prejudice in consequence of Daejan Investment's non-compliance with the consultation requirements. In the judgement of the Court this constituted a serious failing and caused the Respondents serious prejudice. In the present case, the question of prejudice or wrongdoing on the part of the Applicant has not been addressed by the 1st and 2nd Respondents and no submissions of any substance have been advanced about the Applicant's conduct save to criticise to some extent the delay in progressing the works. These may be issues for the future in other proceedings, but they do not feature here. The Tribunal does not find on the evidence that there are grounds to disturb the contractual position.

48. The Tribunal does not make an order under s.20C of the Act or under paragraph 5A of Schedule 11 of the 2002 Act based upon its assessment of the Applicant's conduct in the proceedings. The costs of the proceedings should be regarded as relevant costs in determining the amount of service charges payable.

11 November 2022
Judge P Forster

RIGHT OF APPEAL

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

The application must arrive at the Tribunal within 28 days after the Tribunal sends to tl person making the application written reasons for the decision.

If the person wishing to appeal does not comply with the 28-day time limit, that person sh include with the application for permission to appeal a request for an extension of time ar the reason for not complying with the 28-day time limit; the Tribunal will then decide wheth to extend time or not to allow the application for permission to appeal to proceed.

The application for permission to appeal must identify the decision of the Tribunal to which relates, state the grounds of appeal, and state the result the party making the application seeking.