



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

Case reference : **BIR/00CN/LDC/2021/0006**

Property : **Brindley House, Newhall Street,
Birmingham, B3 1LL**

Applicant : **Brindley House RTM Company Limited**

Representative : **J B Leitch Limited**

Respondents 1 : **The long leaseholders of Brindley House**

Respondent 2 : **Wallace Estates Limited**

Type of application : **An application under section 20ZA of the
Landlord and Tenant Act 1985 for
dispensation of the consultation
requirements in respect of qualifying works.**

Tribunal members : **V Ward BSc Hons FRICS
Judge D R Salter
R Chumley - Roberts MCIEH, J.P**

Date of Decision : **6 July 2021**

DECISION

Background

- 1) By an application received 12 May 2021, the Applicant management company urgently sought dispensation under section 20ZA of the Landlord and Tenant Act 1985 (“the Act”) from all/some of the consultation requirements imposed on the landlord by section 20 of the Act.
- 2) The justification for the application was as follows. The Applicant has been made aware that works are required to the Property due to issues relating to the external façade. Following a review/reports of the external insulation to the external elevations at the Property, it was found that the external wall insulation system was made up of SPS Envirowall Polystyrene and that there was a lack of cavity barriers present. The Applicant was made aware that the issues with the exterior façade system pose a health and safety risk to the residents and the Property in the event of fire and proposes to carry out extensive works to remedy the defects.
- 3) The Applicant sought dispensation from the consultation requirements under section 20ZA of the Landlord and Tenant Act 1985 for the following reasons:
 - a) As the issues highlighted to the exterior of the Property pose a significant health and safety risk to the residents at the Property, the Applicant wishes to proceed with the required works as soon as possible.
 - b) West Midlands Fire Service (WMFS) had stipulated within recent correspondence that the works were to take place within 9 months of February 2021. The consequence of non-compliance could potentially result in the Applicant being served with an enforcement notice.
 - c) The Applicant has registered the Property in respect of the Government Building Safety Fund (“BSF”). It is clearly within the interests of the Respondent leaseholders, as service charge payers, for the BSF application to be made. The Applicant is seeking the full cost of the remedial works, where applicable, via the BSF but is aware that the full funding required may not be granted. The Applicant wishes to proceed with the instruction of the contractor who had tendered the most competitive price (details below), owing to them providing the most cost effective quote for the works and because they are able to comply within the deadlines imposed by the BSF despite the challenges faced in obtaining tenders/instructing professionals in the industry given the current cladding crisis.

d) The Applicant does not envisage that any financial prejudice has been suffered by the Respondents due to the fact that consultation cannot be carried out to its full extent.

- 4) Directions were issued on 25 May 2021. Whilst the Applicant had indicated that they were happy with a determination on paper, the Tribunal considered that due to the importance of the matter at hand and the costs relating to the project, that an oral hearing was required.

The Inspection

- 5) The Tribunal carried out an external inspection of the Property on 29 June 2021.

Participants in the inspection were as follows:

On behalf of the Applicant:

Michelle Henry – A Director of the Applicant RTM company

Olivia Hobbs – Property Manager Centrick Managing Agent

- 6) From the information gleaned from the inspection and the parties' submissions, the Tribunal noted that the Property comprises a seventeen storey (ground and sixteen floors) structure incorporating 182 apartments with a commercial and car parking located at ground level. The Property is presumed by the Applicant to be constructed of a reinforced steel frame with concrete infill panels interspaced with linear horizontal curtain walling system. The top two floors (the penthouse) were an addition to the main structure and are formed with a steel frame and clad with proprietary flat screen cladding panels (Trespa panels) and double-glazed aluminium windows.
- 7) The Property is situated in Birmingham City Centre and sits astride a section of the Birmingham and Fazeley Canal.

The Submissions of the Parties

- 8) The Tribunal convened an oral hearing held by video platform on 1 July 2021.

Participants in the hearing were as follows:

On behalf of the Applicant:

Cameron Stocks

Katie Edwards

Lauren Walker

Counsel Hardwicke Chambers

Solicitor J B Leitch Solicitors

Paralegal J B Leitch Solicitors

James Capper Head of Compliance Centrick Managing Agents
Olivia Hobbs Property Manager Centrick Managing Agents

Respondents

Neil Whittenbury Head of Leasehold and Commercial Services Citizen
Housing Group

9) The written submissions of the parties were as follows:

The Applicant

- 10) The Applicant explained that they are the right to manage company of the Property. The freehold title of the Property is held by Canal & River Trust whilst a head lease of the same is held by Wallace Estates Limited (Respondent 2). Centrick Limited (“Centrick”) manage the Property on behalf of the Applicant as their appointed agent.
- 11) Respondents 1 are the leaseholders of the apartments of the Property and each of these Respondents is a service charge payer. Of these apartments, 31 are held by the Citizen Housing Group Limited (a social housing provider) either outright or on a part ownership basis, and these leases are in a different form to the remainder but granted on substantially similar terms.

The Works proposed

- 12) Following testing of the external facade system on the Property, issues were highlighted to the same. In response, the Applicant instructed Easton Bevins Chartered Building Surveyors to review the external insulation to all of the external elevations at the property and advise in relation to remediation. It was found that the external wall insulation system was made up of SPS Envirowall Polystyrene and that there was a lack of cavity barriers.
- 13) This report, adduced in evidence by the Applicant, concludes that the Property, as designed and constructed, does not satisfy the Building Regulations 2010 Fire Safety Approved Document B for the following reasons:
 - a) Fire smoke and heat should be contained within each compartment i.e. flat or corridor so that in the event of fire, it will not penetrate into the adjacent areas. However, the large penetrations internally and externally and lack of adequate fire barriers at the Property will allow smoke and flame to pass within 3 or 4 minutes to the escape routes and other areas of the building.

- b) The walls of the penthouse which are clad in Trespa panels failed Building Regulations at the time of construction and require replacement.
- 14) The Easton Bevins Report had been based on the findings of Trident Building Consultancy Limited who were instructed to produce a report (the “Trident Report”) to investigate the issues with the cladding. The external cladding of the upper two storeys consists of Trespa non-FR Grade, TYP Standard panels. These panels are referred to as High Pressure Laminate panels (“HPL”).
- 15) The Trident Report confirms that the HPL that encloses the (penthouse) roof top apartments is "...not fire resistant, has a Class D Fire Rating and is a significant fire risk to the property". In addition to the HPL, the insulation behind the HPL has been identified as a PIR (Polyisocyanurate) product and this is confirmed within the report of Sandberg LLP who tested a sample of the insulation. The Trident Report states that this insulation "is combustible and has a s2 smoke release rating (omits lots of smoke) and is a significant fire risk to the property". Finally, the Trident Report states that core tests to the insulation, behind the rendered surfaces (on the first fifteen floors of the building) is made up of polystyrene boards in varying depths, with some areas having no evidence of a vapour barrier. Trident state that "the materials used are a significant fire risk to the property". Sandberg are a Materials Testing Consultancy.
- 16) Copies of the reports produced by Trident and Sandberg LLP were exhibited by the Applicant.
- 17) Accordingly, the Applicant has been made aware that the issues with the exterior facade system pose a health and safety risk to the residents and the Property in the event of fire.
- 18) The assessment form EWS1 (EWS – External Wall System) is designed to provide a clear ‘safe’ or ‘unsafe’ certificate in line with fire safety guidance from the Ministry of Housing, Communities and Local Government (MHCLG). The EWS1 Form for the Property has been rated B 2 in that an adequate standard of safety is not achieved and interim measures are required.
- 19) The Applicant was previously advised by their fire risk assessor that the Property is no longer suitable for a stay put strategy and a simultaneous evacuation policy should be adopted.
- 20) The Applicant has carried out works to install a fire alarm system at the Property to reduce the need for the waking watch that was previously put in place.

21) The Applicant, therefore, intends to carry out the following works which attract a level of expenditure that would ordinarily require consultation:

a) SPS Envirowall Insulation — Floors 1 to 15.

- (i) Remove all existing EPS insulation render and incorrectly applied batts and dispose of appropriately in accordance with Green protocol.
- (ii) Supply and fit new window panels and deeper window sills the appropriate mineral wool batts to be slid beneath the existing window boards, well-sealed around to prevent winds.
- (iii) Render over the face of the Rockwool batt to provide an impervious membrane and face same with Efissus breather membrane or similar.
- (iv) Supply and fit to the entire face of all rendered elevations Rockwool EW1 dual density insulation.
- (v) Apply reinforcing mesh over all the mechanical fixings.
- (vi) Remove and replace all of the panels incorporating PIR.
- (vii) Remove and replace the metal cappings and saddles to the top of the walls below penthouses to match existing.
- (viii) Remove all existing glass and replace with toughened glass on both staircases.
- (ix) Supply, fit and install 2 No. steel staircases from the top floor penthouse to the intermediate floor patio levels staircase.
- (x) Remove all of the existing insulation between the patio slabs on the two intermediate patios and replace with Class A2 insulation batt.
- (xi) Replace the defective balustrade to the Penthouses.
- (xii) Replace all of the balcony timber decking with Enviro Build Hyperion 145 Progrid.
- (xiii) Supply and fit 2 No. AOVs to roof of each of the end staircases and connect to the existing smoke extraction system.

b) Penthouse Apartment (Top 2 floors).

- (i) Remove the existing HPL Trespa system and discard.
- (ii) Expose the SPS and steel framework.
- (iii) Remove the existing 150/200 mm mineral quilt.
- (iv) Supply and fit 250mm thick mineral wool bays, Rockwool Dubs slab or similar. Fix back to the plasterboard and/or SFS frame.
- (v) Remove the existing cement board and discard.
- (vi) Supply and fit Y board.

- (vii) Spray all steel stanchions, horizontal, vertical bracing bars with intumescent paint.
- (viii) Supply and fit Swiss Pearl Zenor system No.67014.
- (ix) Supply and fit to all 4 elevators of both storeys and the winged gable fascia and soffit.
- (x) Undertake structural alterations to existing frame.

The reasons why dispensation is required.

- 22) The Applicant has made this application under Section 20ZA of the Act for dispensation of the usual Section 20 requirements to consult with all Respondents in respect of the works.
- 23) The Building Safety Fund. The Applicant, via their agent, have registered the Property in respect of the BSF. It is within the interests of the Respondents, as service charge payers, for the BSF application to be made. The Applicant is seeking the full cost of the remedial works, where applicable, via the BSF but is aware that the full funding required may not be granted. In order to adhere to the BSF timescales, the Applicant was initially required to submit a full costs application by 31 December 2020. This deadline was subsequently extended by MHCLG to 30 June 2021. In terms of the deadline for works to begin, this was initially 31 March 2021 and thereafter extended by MHCLG to 30 September 2021. Pursuant to the MHCLG 'Building Safety Fund for the remediation of non-ACM Cladding Systems Fund Application Guidance, the BSF is available on a 'first come first served' basis. The BSF guidance states that "sums will be allocated from the £1bn until the total funding is spent. This is to encourage building owners to move quickly to begin remediation projects " and, "If the funds are fully allocated, applicants will be notified that no further funding is available. It is therefore important that at every step you provide the information we require to progress your application as quickly as possible". Centrick have been informed that the Property is eligible for funding however, the extent of the funding which is to be received is currently unknown (see update below).
- 24) A tender by Woodman Bros Facades Limited on 7 January 2021 indicated that the costs of the works are expected to be in the region of £4,685,248.76 excluding VAT and fees. Woodman anticipate that the works contract would be in place for 42 weeks from the date of possession.
- 25) A tender by ASW Property Services Limited ("ASW") confirmed on 4 January 2021, that the cost of the works was expected to be in the region of £3,439,824.50 excluding VAT and fees. ASW anticipate that the contract will be in place for 65 weeks from the date of possession.

- 26) It is anticipated that the fire remedial works fall under the scope of the BSF, should the application be successful.
- 27) The Applicant wishes to proceed with the instruction of ASW, owing to them providing the most cost effective quote for the works and because they are able to comply within the deadlines imposed by the BSF despite the challenges faced in obtaining tenders/instructing professionals in the industry given the current cladding crisis.
- 28) If the Applicant is eligible for full or partial funding, it is unknown when this will be decided, and the contractor will need to be in place to commence works at short notice with the cost of the works agreed.
- 29) The Applicant is therefore proceeding with the instruction of ASW in order to ensure that a contractor is available to begin the works in readiness for the revised BSF deadlines or before if the Applicant can proceed earlier. It is widely known that contractors for cladding remedial works are in short supply and will continue to be further in 2021 as there are a multitude of buildings in the UK which require substantial works to their exterior wall systems. Such works are likely to take place at the same or similar times to be in compliance with the terms of the BSF if successful. The Applicant therefore wishes to commence works as soon as possible when in receipt of funding.

The Consultation carried out

- 30) In accordance with section 20 of the Act, the Applicant must consult with the Respondents before carrying out major works to the Property where each Respondent's contribution will exceed £250. As the works proposed will exceed a contribution of £250 per Respondent, the consultation process would be applicable. The Applicant provided a summary of the consultation process to assist the Tribunal and the Respondents.
- 31) Centrick, on behalf of the Applicant, began the consultation process by sending a Stage 1 Notice of Intention dated 16 November 2020 to all Respondents in respect of the proposed works. To date, Centrick have not received any responses or objections to the Notice of Intention.

The determination sought

- 32) The Applicant seeks dispensation of the consultation requirements under section 20ZA of the Act which provides:

"(1) 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 or qualifying long term agreement, the

tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.”

- 33) The above provision allows the Tribunal to grant dispensation if it is considered reasonable to do so.
- 34) As the issues to the exterior of the Property highlighted within the Trident Report pose a significant health and safety risk to the residents at the Property, the Applicant wishes to proceed with the works required.
- 35) WMFS has also stipulated within a letter dated 9 February 2021, that the works are to be carried out within 9 months of that letter. The consequence of non-compliance could potentially result in the Applicant being served with an enforcement notice.
- 36) The Applicant seeks dispensation in respect of the consultation for the works. The Applicant does not envisage that any financial prejudice has been suffered by the Respondents due to the fact that consultation cannot be carried out to its full extent.

Relevant Case Law

- 37) The Applicant cited relevant case law. The Supreme Court’s ruling in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 (“*Daejan*”), and other prior decisions, including *Paddington Basin Developments v West End Quay* [2010] All ER (D) 139 (Apr), strongly indicated a landlord and/ or management company is at significant risk if it elects to proceed without following the consultation processes exactly as required by section 20 of the Act.
- 38) *Daejan* confirms that the Tribunal, in considering dispensation requests, should focus on whether tenants are prejudiced by the lack of the consultation requirements of section 20. The Applicant submits that the Respondents will not be prejudiced by the grant of dispensation in this matter, as the works are required and are necessary to ensure the safety of the residents, the Property and prevent any enforcement notices being served.

Summary

- 39) The Applicant’s key submissions in support of this Application for dispensation from the consultation requirements set out in section 20 are as follows:
 - a) The Applicant must consult with the Respondents before carrying out works to the Property as each Respondent’s Contribution will exceed

£250. Unless the consultation requirements are either complied or dispensed with, the relevant contributions of the Respondents are limited to £250 per leaseholder.

- b) The Applicant seeks dispensation in accordance with section 20(1)(b) of the Act owing to the nature of the works and the potential consequences if the works were to be delayed.
 - c) The Applicant wishes to proceed with the contractor ASW and to confirm this within its application to the BSF.
 - d) The Respondents have suffered no prejudice caused by the fact that the Applicant has not fully carried out the consultation process. The Applicant is complying with the requirements of the BSF in the hope that it will secure government funding for a proportion of the costs of the proposed works.
 - e) The Applicant believes that it has complied with the spirit of the section 20 consultation process as far as it possibly can considering the circumstances.
 - f) If dispensation is not granted, the Property may lose funding from MHCLG under the BSF resulting in a significant increase in service charge due to be paid by the Respondents.
- 40) The Applicant requests the Tribunal to grant unconditional dispensation in respect of the works required, to ensure the health and safety of the Residents at the Property and to ensure that its application is considered by MHCLG for government funding. By serving the Notice of Intention, the Applicant has complied with the spirit of section 20 and it has sought to be as transparent as possible with the leaseholders by providing regular updates via its online portal.
- 41) Finally, the Applicant does not believe that the Respondents will be prejudiced by the lack of a complete consultation process.

The Respondents

- 42) Of the Respondents, only the Citizen Housing Group Limited (“Citizen”) made any submissions. Citizen is a social landlord and owns or part owns (on a shared ownership basis) 31 apartments in Brindley House.
- 43) Citizen’s statement was “broadly supportive” of the dispensation application but required further assurances and detail, as set out below. The Tribunal finds it convenient to list Citizen’s comments followed by the Applicant’s

responses (provided in a supplementary submission prior to the hearing) to each point in *italics* below:

- a) Homes England (the non-departmental public body that funds new affordable housing in England) have given written support that they support the dispensation request. “Should they not, the risk is non-payment and costs would fall on the leaseholders. It is understood an award of approximately £5.5m to Brindley RTM. The BSF is a £5bn fund of public money, and we are concerned they may not support full process being followed”.

Homes England do not have any involvement in the S20 LTA consultation process, or the dispensation application and they do not have the necessary authority or qualifications to make such observations. The request for such written support is therefore unnecessary.

Notwithstanding the above, the Applicant is in regular correspondence with Homes England regarding the works. The Applicant also understands that Citizen have been in correspondence with the Homes England case worker and have received written assurance about the process surrounding release of payment and what has to be produced by the Applicant. It is understood that they are happy to move forward.

The Applicant should like to point out that the Ministry of Housing, Communities & Local Government Guidance (“MHCLG”) guidance, ‘Building Safety Fund for the remediation of non-ACM Cladding Systems’, provides that in order to be eligible for funding, the costs of the remediation works must qualify as a service charge. It therefore follows that the Applicant must follow the relevant statutory and contractual rules and obligations relating to service charge. Such obligations include consulting with leaseholders in accordance with s20 ETA, or, in the alternative, applying to the FTT for dispensation.

- b) A limit of “dispensation” be set by the Tribunal, in the event of contract overspend. Citizen would be happy to agree a 15% contingency on NET spend (exc. VAT and Fees). We recognize the risk that unexpected costs arise and the RTM’s wish to not have to delay the works which would incur significant additional expense.

The Applicant invites the Tribunal to grant unconditional dispensation in respect of this matter on the basis that a significant proportion of the costs relating to the remedial works are due to be

covered via the BSF and no prejudice has been suffered by the Respondents owing to the fact that the Stage Two Notice of Estimates was not issued.

The Applicant contends that it would not be in the interests of the Applicant, Citizen or the other leaseholders to limit the ‘dispensation’ to be granted by the Tribunal due to the fact that, as Citizen have pointed out, unexpected costs are commonplace and any such overspend cannot fall to the Applicant who are a Right to Manage (“RTM”) Company with no assets of capital value or interest in the Property.

Whilst the Applicant is hopeful that the quotation provided by ASW Property Services Limited (“ASW”) will cover the costs of the works, it understandably cannot guarantee this and avers that it is neither just nor reasonable for Citizen to seek such conditions to be attached to the dispensation sought.

Furthermore, Homes England have confirmed that an application can be made to the BSF to cover additional costs arising during works.

- c) The preferred contractors’ ability to deliver (track record, capacity, insurance coverage).

Prior to being awarded the contract, ASW were required to complete a contractor questionnaire which indicated to the Applicant that they have the appropriate experience and qualifications to carry out the cladding remedial works. It is understood that ASW have several years’ experience in delivering contracts of this discipline.

Furthermore, the Applicant confirms that ASW have Safe Contractor approval, Environmental Policy certification, and all relevant insurances.

- d) The project timeline of works and specifications.

It is currently anticipated that the works are expected to last 78 weeks and the project timeline is currently in the process of being prepared. The Applicant is happy to consider disclosing this to Citizen once it is in receipt of the same.

The specification of works is attached at Annex 6 of the Applicant’s Statement of Case.

- e) The payment schedule to the contractor and terms.

The terms of the BSF funding are as follows:

- a. 80% of the funding, if obtained, will be provided upfront; and
b. The remaining 20% of the funding will be provided upon completion of the works.*

In terms of the payment schedule with the contractor, monthly valuations will take place by the Contract Administrator all in accordance within the terms of the signed Joint Contracts Tribunal ("JCT") contract to ensure the contractor is only paid for the works that have been completed up until that point.

- f) The impact on Thermal Insulation, Energy Performance Certificates, and SAP rating of what is to be fitted against what is present now. This will impact residents financially, and both Citizen and shared owners "asset value". Will additional internal works be needed to compensate for any loss of thermal efficiency? Will SAP Level C be achieved by 2030 (the standard we are required to achieve for social letting purposes)?

Whilst irrelevant to the application for dispensation, and not raised previously despite Citizen being aware of the need for the works, the Applicant is investigating the position in regard to the above queries raised by Citizen. The Applicant will endeavour to provide this information to Citizen at the earliest opportunity however, it should be noted that to provide these answers will require the opinion of a specialist.

The Applicant can confirm at this stage that the thermal efficiency of the Property will be improved. The existing penthouse U Value is 0.46 W/m²K, and the proposed system is 0.3 W/m²K. The proposed U Value for floors 1-15 is 0.25 W/m²K. This design has been primarily focused on fire remediation whilst meeting the U value requirements of current building regulations at 0.3. If any additional measures were proposed for energy performance this would not be covered by the BSF as it would be ineligible.

- g) The overall fees and VAT.

The total charges relating to the works is standing at £6,531,392.05 inclusive of VAT.

- h) The total estimated costs that are not BSF eligible and approximately what this is expected to be per apartment (Citizen having 31 homes).

Approximately £550,583.00 of the total estimated costs are not eligible to be financed via the BSF.

Whilst yet to be confirmed, the costs per apartment are likely to be between £2,000- £4,000.

- i) Which costs and fees elements are not BSF eligible?

The Applicant provided a summary of the works required to be undertaken in which the cost will not be recoverable from the BSF:

a. Removal of Timber balcony decking on the penthouses and installation of Enviro Build Hyperion 145 Progrid;

b. Removal of existing glass to both staircases and installation of toughened glass;

c. Installation of steel staircases and fire escapes for penthouses;

d. Five smoke extraction systems to the roof;

e. Defective Balustrades;

f. The supply and fitting of two AOV systems

- j) That quotes are still valid, in light of Building Industry warning of a sharp increase in material prices since quotes were provided – Jewsons are quoting 20% increases in some instances.

The Applicant confirms that the contractor's quotes as stated within the Applicant's Statement of Case are still valid, notwithstanding the Building Industry warning of an increase in material prices since the original quotes were provided.

- k) The position with Fire Authorities as, works will go well beyond their 9-month deadline commencing from Feb 21. The preferred contractor has stated works will take an estimated 65 weeks.

The Applicant is in regular verbal communication with WMFS via its surveyor who are happy with the programme of works and timescales set out.

- 44) In the Applicant's conclusion following the observations of Citizen, it is noted that the latter states "*if the observations raised (within their letter dated 18 June 2021) can be clearly answered then we do not believe we will be prejudiced*".
- 45) The Applicant contends that the issues set out within Citizen's letter have been addressed to a reasonable extent and so far as is possible in the circumstances, despite the concerns raised not amounting to evidence of financial prejudice. As confirmed within *Daejan*, the Supreme Court confirmed that the Tribunal should exercise its jurisdiction in dispensation claims in the following way:
- "The correct question was whether, if dispensation from the requirements was granted, the tenants would suffer any relevant prejudice"*.
- 46) It was further confirmed within that authority that the purpose of the section 20 consultation requirements is to protect tenants in relation to service charges and that the right to be consulted is not a free-standing right. Dispensation should not be refused solely because the landlord had departed from the consultation requirements. For the avoidance of doubt, it is the Applicant's position that the Citizen have failed to provide any evidence which would suggest that they have suffered any relevant prejudice as a result of the lack of consultation.
- 47) The Tribunal is invited to grant the Applicant unconditional dispensation from the s20 consultation requirements as sought within its application and statement of case.

The Hearing

- 48) At the hearing, the Tribunal initially invited Mr Stocks to outline the application and the reasons for the same.
- 49) As there had been no objections *per se* to the application for the dispensation, the Tribunal then moved onto the points and queries raised by Citizen. Of these, Mr Whittenbury said that with the exception of b) above, all had been answered or satisfied by the Applicant's responses prior to the hearing (given in *italics* above).
- 50) Citizen asked the Tribunal to set a limit within the dispensation granted to limit any overspend to a maximum of 15% contingency of the net cost of the works excluding VAT and Fees.

- 51) On behalf of the Applicant, Mr Stocks reiterated the response to this point made in writing before the hearing to the effect that a significant proportion of the costs of the works are due to be covered by the BSF. Ms Hobbs stated that her liaison at the BSF had indicated that any requests for additional funds (relating to existing applications) were likely to be looked on favourably in any event. The imposition of such a restriction, could in the event of an overspend, result in a further dispensation application and delay the project which should be considered in light of the fact that the waking watch costs are £1,600 per day and annual service charges per apartment of approximately £6,000 per annum.
- 52) On behalf of Citizen, Mr Whittenbury was mindful of the financial impact of any delay but appeared to be, at least partially, re-assured by the possibility of further applications for additional funding from the BSF and the anticipated positive reaction to such applications which was expressed by Miss Hobbs.
- 53) Mr Stocks also advised at the hearing that approximately a week before the hearing, funding had been approved by the BSF.
- 54) On behalf of the Applicant, Mr Stock concluded his submissions by inviting the Tribunal to grant unconditional dispensation for the works.

The Law

- 55) Section 20 of the Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularised, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee has to pay by way of a contribution to “qualifying works” (defined under section 20ZA (2) as works to a building or any other Property) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant in excess of £250. The Applicant states that the works proposed will exceed a contribution of £250 per leaseholder.
- 56) Provision for dispensation in respect of some or all such consultation requirements is made in section 20ZA (1). See above, paragraph 32.
- 57) In *Daejan*, the Supreme Court noted the following:
 - a) Prejudice to the tenants from the landlord’s breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20ZA (1).

- b) The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
 - c) Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
 - d) 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
 - e) 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.
 - f) Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
 - g) Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
 - h) In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
 - i) The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
 - j) 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 application under section 20ZA (1).
- 58) For the sake of completeness, it may be added that the Tribunal's dispensatory power under section 20ZA of the Act only applies to the

aforesaid statutory and regulatory consultation requirements in the Act and does not confer on the Tribunal any power to dispense with contractual consultation provisions that may be contained in the pertinent lease(s).

Deliberations

- 59) Initially, the Tribunal considered the principle of dispensation. The guidance from *Daejan* is that the Tribunal should consider whether any prejudice will be suffered by the Respondents by the consultation procedures not being followed. No Respondent identified any prejudice and Citizen's comments were "*broadly supportive of the application*".
- 60) Whilst, the fire safety risk caused by the cladding issues is currently being "managed", it is clear that the remedial works need to be carried out as soon as possible in order to ensure the safety of the residents.
- 61) In addition, the Tribunal noted that the Applicant had obtained two quotations for the works and had opted for the contractor who had tendered the lowest price. Financially, the prospect of a delayed application to the BSF caused by full consultation could potentially be ruinous for many Respondents as the full cost of the works per apartment is likely to be in the order of £35,000.
- 62) The Tribunal therefore considers that in principle, dispensation should be granted.
- 63) *Daejan* confirms that the Tribunal can impose conditions on the dispensation granted and therefore the next matter for the Tribunal to determine was whether as requested by Citizen, a "collar" should be placed on the dispensation to the effect that if the net cost of the works were to rise by more than 15%, consultation would be required.
- 64) The Tribunal can fully appreciate that a social housing provider, in particular, would be mindful of costs rising unfettered however Citizen could if they were concerned about the ultimate cost, make an application under section 27A of the Act for a determination of the reasonableness of the same. Given the fact that Citizen have this option, the Tribunal cannot see any benefit to the Applicant or the Respondents in general to the imposition of such a condition. Overspends on projects of this nature are likely and particularly in the context of a seventeen building constructed over a canal lock on a tight city centre site. The Tribunal, therefore, declines to impose such a condition for the possibility of a delay in the project which such a condition may cause.

Determination

- 65) The Tribunal grants unconditional dispensation from the consultation procedures for the following works set out in paragraph 21) above.
- 66) Parties should note that this determination relates only to the dispensation sought in the application and does not prevent any later challenge by any of the lessees under sections 19 and 27A of the Act on the grounds that the costs of the works incurred had not been reasonably incurred or that the works had not been carried to a reasonable standard.

Appeal

- 67) If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

V Ward