FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LDC/2021/0148**
Property	**:**	**Suttons Wharf, London E2**
Applicant	**:**	**Guinness Homes Ltd**
Representative	**:**	**Trowers & Hamlin**
Respondents	**:**	**Leaseholders at Suttons Wharf**
Representative	**:**	**Blake Morgan (for 208 leaseholders)**
Type of application	**:**	**Dispensation from statutory consultation requirements**
Tribunal	**:**	**Judge Nicol** **Ms S L Phillips MRICS**
Date of decision	**:**	**18th August 2021**

DECISION

The Tribunal grants the Applicant dispensation from the consultation requirements in relation to the works subject to the following conditions:

1) The Respondents' reasonable costs of this application must be paid by the Applicant.
2) The Applicant's costs shall not be recoverable through the service charge.
3) The Applicant is required to provide a copy of any further expert report within a reasonable period of time to those Respondents who register an interest in receiving such reports.

Reasons

1. The Applicant holds leases of four buildings, collectively known as Suttons Wharf:

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(a) Titanium Point, E2 0FA
(b) Regalia Point, E2 0FG
(c) Graphite Point, E2 0FS
(d) Grand Regent Towers, E2 0FG

2. There is a total of 272 apartments, the leaseholders of whom are collectively the Respondents to the current application.

3. Suttons Wharf is one of the many victims of the need to take extensive, and expensive, fire safety precautions following the tragedy at Grenfell Tower. The Applicant, with the assistance of various expert contractors, has identified that the following works are required at Suttons Wharf:

(a) Removal of unsafe non-ACM cladding;
(b) Installation of new cladding as replacement to unsafe non-ACM cladding; and
(c) Removal and reinstatement of decking and associated insulation.

4. The Applicant asserts that, although the remedial works would be subject to consultation requirements under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003, there would not be enough time to complete the consultation process. Therefore, on 19th May 2021, the Applicant applied to the Tribunal for dispensation from those requirements under section 20ZA of the Act (without that dispensation, they would be limited to recovering only £250 from each lessee).

5. Under section 20ZA(1) of the Act, the Tribunal may dispense with the statutory consultation requirements if satisfied that it is reasonable to do so. The Supreme Court provided further guidance in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854:

(a) Sections 19 to 20ZA of the Act are directed to ensuring that lessees of flats are not required to pay for unnecessary services or services which are provided to a defective standard or to pay more than they should for services which are necessary and provided to an acceptable standard. [42]

(b) On that basis, the Tribunal should focus on the extent to which lessees were prejudiced by any failure of the landlord to comply with the consultation requirements. [44]

(c) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements, an unconditional dispensation should normally be granted. [45]

(d) Dispensation should not be refused just because a landlord has breached the consultation requirements. Adherence to the requirements is a means to an end, not an end in itself, and the dispensing jurisdiction is not a punitive or exemplary exercise. The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by and what amount is to be paid for them. [46]

(e) The financial consequences to a landlord of not granting dispensation and the nature of the landlord are not relevant. [51]

(f) Sections 20 and 20ZA were not included for the purpose of transparency or accountability. [52]

(g) Whether or not to grant dispensation is not a binary choice as dispensation may be granted on terms. [54, 58, 59]

(h) The only prejudice of which a lessee may legitimately complain is that which they would not have suffered if the requirements had been fully complied with but which they would suffer if unconditional dispensation were granted. [65]

(i) Although the legal burden of establishing that dispensation should be granted is on the landlord, there is a factual burden on the lessees to show that prejudice has been incurred. [67]

(j) Given that the landlord has failed to comply with statutory requirements, the Tribunal should be sympathetic to the lessees. If the lessees raise a credible claim of prejudice, the Tribunal should look to the landlord to rebut it. Any reasonable costs incurred by the lessees in investigating this should be paid by the landlord as a condition of dispensation. [68]

(k) The lessees' complaint will normally be that they have not had the opportunity to make representations about the works proposed by the landlord, in which case the lessees should identify what they would have said if they had had the opportunity. [69]

6. The Tribunal issued directions on 28th June 2021. Amongst other matters, the Applicant was required to inform all the Respondents of their application, which they did save that a few were provided with the documents a few days late due to problems with their email addresses.

7. One Respondent, Mr P Stone of 803 Graphite Point, used the process set out in the directions to object that the Applicant had actually had sufficient time to complete the statutory consultation process so that their failure to do so was mismanagement.

8. A group of 208 leaseholders, represented by Blake Morgan solicitors, made a similar point in a letter dated 14th July 2021 but were prepared not to object to the grant of dispensation so long as the grant was subject to certain conditions.

9. The Applicant responded that they were agreeable to dispensation being granted subject to conditions but they refuted that they should have been able to carry out the statutory consultation process. They say investigations were completed to assess the external wall system (EWS) by Bickerdike Allen Partners LLP and Hollis Global Fire Engineers LLP in September 2020 and a report followed on 20th October 2020.

10. Some of the works to remedy the identified issues qualified for funding from the Government's Building Safety Fund. Although there was a later extension, at that time any applications had to be in by the end of

the year with contractors on site by the end of March 2021. The Applicant asserts that compliance with the full statutory consultation process may take 6 months which would have endangered any such application. Given that the works were estimated to cost £26m, plus VAT, any such funding would be vital to the viability of the works and the financial health of the leaseholders who would otherwise meet the cost through their service charges.

11. Instead of using the statutory consultation process, the Applicant wrote to the Respondents on 23rd October and 7th December 2020 and held a virtual meeting on 27th January 2021. They did not carry out a tendering process but identified their preferred contractor, Stanmore Contractors Ltd. The works are now due to start in September 2021.

12. The Tribunal is dubious of the Applicant's claim. There is no reason why they could not have started the statutory consultation process back in October 2020 and seen how much of it they could complete rather than trying to re-invent the wheel with an entirely new consultation process of its own devising (which did not appear to contain much consultation rather than information distribution). The statutory process has been devised to maximise opportunities for consultation and effective decision-making in relation to major works and should not be abandoned simply because difficulties are anticipated.

13. Having said that, the Tribunal does not understand any of the Respondents, including Mr Stone, to be opposed to the grant of dispensation, so long as they retain the power to challenge the cost of the works later if they wish to do so. Further, no prejudice to the Respondents has yet been identified. They believe a proper tendering process could have resulted in lower costs but have not otherwise identified any relevant prejudice, let alone what they could have said to avoid it. All parties accept that the work needs to be done and time is now pressing, even if it wasn't as pressing to the same degree previously.

14. The Respondents represented by Blake Morgan proposed that dispensation be granted subject to conditions to which the Applicant has now said they agree:

    (a) The dispensation should be made expressly without prejudice to the issue of whether any service charge costs are reasonable or payable. In fact, this is the very nature of the Tribunal's powers under section 20ZA which extend no further than to grant dispensation and leave all other issues open (see paragraph 5(c) above).
    (b) The Respondents' reasonable costs relating to their review of the application should be paid by the Applicant.
    (c) The Applicant's costs should not be recoverable through the service charge, the Tribunal having the power to make an order to that effect under section 20C of the Landlord and Tenant Act 1985.

15. The Respondents also asked for a condition that the Applicant be required to provide copies of any further expert reports within a reasonable period of time. The Applicant did not suggest they opposed this. The Tribunal believes there should be such a condition save that, given the large number of potential recipients, the Applicant should only have to send copies of any such reports to those Respondents who expressly register an interest in receiving them.

16. In the circumstances, the Tribunal is satisfied that it is reasonable to dispense with the consultation requirements in relation to the proposed fire safety works, subject to the conditions set out above. As already stated, this decision does not address the reasonableness or payability of any service charges arising from these works.

Name: Judge Nicol **Date:** 18th August 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).