

Insights

IT'S URGENT! DISPENSATION WITH SERVICE CHARGE CONSULTATION REQUIREMENTS, BUT AT WHAT COST?

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SUMMARY

The First Tier Tribunal (FTT) has allowed a landlord to dispense with the statutory requirement to consult with leaseholders prior to carrying out substantial fire safety works to a multi-storey residential building. Dispensation was granted but subject to conditions resulting in additional cost to the landlord.

Leaseholders of residential buildings who pay variable service charges must be consulted *before* a landlord carries out “qualifying works” to the building, the cost of which it intends to recover through the service charge. Failure to comply with the stringent statutory requirements under section 20 of the Landlord and Tenant Act 1985 (and the associated Regulations) will limit a landlord’s recovery of the cost of the works to £250 per leaseholder, potentially leaving the landlord with a hefty bill for any shortfall. If there is a risk of non-compliance, for instance if works are so time critical that a landlord cannot afford to allow the consultation to run its course, a landlord may apply to the FTT for “dispensation.” Dispensation will be given if the FTT considers that it is reasonable in all the circumstances for the landlord to dispense with the statutory consultation process.

THE FACTS

A recently published FTT decision (*Grey GR Ltd Partnership v The Leaseholders*) concerned the FTT’s power to grant dispensation to a landlord from its statutory duty to consult with leaseholders under section 20ZA of the Landlord and Tenant Act 1985 in respect of historic and future qualifying works. Grey GR Ltd Partnership owns a residential tower block in Stevenage comprising 73 apartments. After the Grenfell Tower tragedy, in 2020 the landlord sought expert fire safety advice following which it installed a common fire alarm (replacing an expensive waking watch) and tendered for works to replace the building’s combustible cladding, at an estimated cost of more than £10 million. The landlord submitted that the cost of these fire safety measures would be payable by the leaseholders as service charges under their leases. To overcome the risk of a

statutory limit of £250 liability per leaseholder the landlord sought dispensation from the FTT for failing to comply with the statutory consultation requirements *prior to* installing the common fire alarm and tendering for the necessary works.

The uncertainty around the scope of the cladding works played a crucial role in the application and the FTT's decision. The landlord had made an application for a contribution to the works from the Building Safety Fund that required it to meet the Government PAS9980 inspection standard and comply with funding deadlines. As a result, the landlord chose a two-stage JCT Design and Build contract; a procurement route which it claimed was not compatible with the mechanics of the statutory consultation procedure. Broadly, the leaseholders did not object to the grant of dispensation but were concerned with the conditions that should be imposed and, ultimately, the appropriateness, quality and scope of the cladding replacement works.

DECISION

The FTT had to determine if it was reasonable to dispense with the consultation requirements and if so, on what terms, in the context of both historic and future service charges.

The question whether dispensation was reasonable turned on whether it would result in prejudice to the leaseholders (see the recent Upper Tribunal decision of *Marshall v Northumberland & Durham Property Trust Limited* [2022] UKUT 92 (LC), covered in our [June 2022 Briefcase](#), which also cites well-known historic cases on prejudice). The FTT accepted that the communal fire alarm system was a cheaper and better interim solution than the waking watch. It also acknowledged that it would be in all parties' best interests to secure Government funding for the cladding remediation works. Accordingly, installing the fire alarm quickly and pressing ahead with the main works tender and the application to the Building Safety Fund had to be the landlord's priority over compliance with the statutory consultation. This meant that the FTT granted dispensation from the need to consult in respect of both the interim works and the future cladding remediation works.

However, in relation to the future works, because of the significant sums in question and the uncertainty over their scope, the FTT found that failure to properly consult could result in prejudice. To address that risk, dispensation was granted on numerous conditions including:

- a contribution to the leaseholders' legal costs of the dispensation application;
- a capped indemnity of £20,000 plus VAT for the leaseholders to take expert advice to inform their observations on the future works, once determined, and to address the "likely and potential prejudice" to the leaseholders arising from the landlord's choice of a two-stage procurement route and its inability to consult; and
- provision for a form of (informal) consultation with the leaseholders to include the furnishing of information relating to the Building Safety Fund application, building contract, expert reports and updates on the building's fire safety defects.

WHY IS IT IMPORTANT?

The decision is a reminder that for leaseholders to successfully oppose a dispensation application or impose onerous conditions there needs to be a causal link between the breach of consultation requirements and the prejudice suffered. While this will turn on the facts of each case, often it is difficult for leaseholders to sufficiently meet that test in order to persuade the Tribunal to refuse dispensation entirely. Further, even in cases where there is a risk of prejudice the Tribunal will generally take a pragmatic approach (but likely impose conditions), particularly where works are needed to procure building safety. That is positive for landlords, who can face extreme consequences if dispensation is refused and their cost recovery is capped at £250 per leaseholder for expensive qualifying works.

The decision also calls into question the effect of the conditions because while they place a set of additional obligations on the landlord, dispensation has still been granted. What then is the risk to landlords of failing to comply? The answer will to an extent depend on the circumstances of each case, but one potential option open to leaseholders would be to use that failure to support an application under section 19 of the 1985 Act, challenging the reasonableness of the costs ultimately incurred and thereby limiting the landlord's recovery under the service charge via an alternative route. So it remains in the landlord's interest to comply with any conditions attached.

This is potentially the start of a raft of Tribunal cases exploring the interplay between the 1985 Act and the new Building Safety Regime. Here the FTT held that even though there was potential prejudice to leaseholders, the conditions imposed sufficiently addressed that risk, and it was more important that the landlord sought third party payment for the cladding works from the Building Safety Fund, which would ultimately benefit all. This case has attracted wider attention because after the FTT gave its decision, Grey GR Limited Partnership became one of the first companies to face action from the Recovery Strategy Unit over Vista Tower. The Department for Levelling Up gave 21 days' notice to the landlord to commit to remediating the building's fire safety defects that were the subject of this application.

TOP TIPS FOR LANDLORDS

- There is no guarantee that a dispensation application will protect from a failure to consult and each case will turn on its own facts. Where possible, follow the statutory procedure to the letter.
- If it is not possible to implement a full consultation (for instance because the works are so urgent):
 - Prioritise issuing a first Notice of Intention which provides as much clarity as to the scope of works as possible.

- Afford leaseholders a period of time (even if not the full 30 days) to make observations on the works' scope and be prepared for them to engage experts to properly advise them.
 - If leaseholders nominate contractors, seek quotes.
 - Take all steps possible to evidence a competitive and fair tender process.
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- If third party funding may be available explore all avenues and be prepared to provide evidence.

RELATED PRACTICE AREAS

- Real Estate
- Real Estate Disputes
- Real Estate Sector

MEET THE TEAM



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