Neutral Citation Number: [2024] UKUT 56 (LC)

Case No: LC-2023-425

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: CH1/23UC/LDC/2023/0013

4 March 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – consultation requirements – dispensation under section 20ZA of the Landlord and Tenant Act 1985 – whether works required to be urgent for a dispensation to be granted – position of equitable owner during the registration gap – conflict of interest

BETWEEN:

R M RESIDENTIAL LIMITED

Appellant

-and-

(1) WESTACRE ESTATES LIMITED
(2) BELLRISE DESIGNS LTD

Respondents

2 The Waterloo,
Cirencester,
GL7 2PZ

Upper Tribunal Judge Elizabeth Cooke
Hearing date: 29 February 2024

Mr Charles Auld and Ms Kayleigh Bloomfield for the appellant, instructed by Hughes Paddison Solicitors

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The following cases are referred to in this decision:

Daejan Investments Limited v Benson [2013] UKSC 14
Holding and Management (Solitaire) Limited v Leaseholders of Sovereign View [2023] UKUT 174 (LC)
Lambeth LBC v Kelly [2022] UKUT 290 (LC)
Marshall v Northumberland & Durham Property Trust Limited [2022] UKUT 92 (LC)
Satyam Enterprisies Ltd v Burton [2021] EWCA Civ 287

Introduction

1. This is an appeal from the refusal of the First-tier Tribunal ("the FTT") to grant the appellant landlord a dispensation from the statutory requirement to consult its tenants prior to carrying out major works.

2. The appellant was represented in the appeal by Mr Charles Auld and Ms Kayleigh Bloomfield, both of counsel; Ms Bloomfield appeared for the appellant in the FTT. I am grateful to them both. The respondents have been represented throughout by Mr Jonathan Waites; he wrote to the Upper Tribunal two days before the hearing to say that he was prevented by ill-health from attending. He did not request an adjournment.

3. With his email to the Tribunal Mr Waites enclosed a witness statement in which he alleges criminal conduct including fraud, theft and conspiracy against over a dozen individuals, states that the appellant has acquired the property by fraud, and suggests that the building should be demolished. The respondents do not have permission to adduce witness evidence in the appeal. The statement might be treated instead as a skeleton argument; however, it contains nothing relevant to the issues in the appeal and I make no further reference to it.

The legal background

4. Two areas of law are obviously relevant to this appeal; first, the consultation requirements in section 20 of the Landlord and Tenant Act 1985; second, the provisions for dispensation from those requirements in section 20ZA. Less obviously, we shall have to look at the law relating to the "registration gap": the period between purchase of the property and the registration of the purchaser as proprietor at H Land Registry. I defer consideration of the latter point until the relevant part of the decision, and set out here just the law relating to consultation and dispensation.

5. Section 20 of the Landlord and Tenant Act 1985, together with the Service Charges (Consultation Requirements) (England) Regulations 2003, created a statutory procedure for tenants to be consulted before major works are undertaken which they will have to pay for in the service charge.

6. The consultation procedure must be followed before "qualifying works" are carried out; "qualifying works" are defined by regulations made under section 20 as work that is going to cost each leaseholder more than £250. If the consultation requirements are not complied with, the contribution of each tenant to the cost of doing that work is limited to £250 unless the landlord obtains a dispensation from the consultation requirements under section 20ZA of the 1985 Act.

7. As to the procedure itself, in brief, the landlord must send out a notice of intention to do the works and give the tenants at least 30 days to make observations; it must obtain estimates, including from anyone nominated by the tenants; it must give notice to the tenants about the estimates and give them 30 days to make representations; and within 21 days of engaging a contractor it must (unless the contractor gave the lowest estimate or was nominated a tenant) give the tenants a statement of its reasons for doing so.

8. Section 20ZA says this:

> "(1) Where an application is made to [the FTT] 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.

9. That provision gives the FTT a discretion to dispense with the requirements. The Supreme Court in *Daejan Investments Limited v Benson* [2013] UKSC 14 explained how that discretion is to be exercised. At paragraph 44 Lord Neuberger said :

> "44. Given that the purpose of the [consultation requirements] is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.
>
> 46. I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the Requirements. That view could only be justified on the grounds that adherence to the Requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. …
>
> 50. In their respective judgments, the LVT, the Upper Tribunal and the Court of Appeal also emphasised the importance of real prejudice to the tenants flowing from the landlord's breach of the [consultation requirements], and in that they were right. That is the main, indeed normally, the sole question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1).

10. As Lord Neuberger pointed out at paragraph 65, that is the relevant prejudice and no other:

> "The tenants can always contend that they will suffer a disadvantage if a dispensation is accorded; however, as explained above, the only disadvantage of which they could legitimately complain is one which they would not have suffered if the [consultation requirements] had been fully complied with, but which they will suffer if an unconditional dispensation were granted."

11. So the consultation requirements are not an end in themselves, and failure to consult is not something to be punished. On many occasions the urgency of the work will have been such that the landlord obviously did the right thing, and acted in the tenants' best interests, in going ahead without waiting to go through the consultation process; see for example *Holding and Management (Solitaire) Limited v Leaseholders of Sovereign View* [2023] UKUT 174 (LC), where the landlord acted swiftly to get a fire alarm system installed so as to put a stop to the financial haemorrhage caused by the maintenance of a waking watch. Whether or not the work was urgent, if the tenants have not been prejudiced as a result of the failure to consult then dispensation should normally be granted, and it can be granted subject to conditions.

12. The sort of prejudice that will have a bearing on dispensation is where the tenants can show that they would have been able to suggest a better or cheaper way of doing the work: see for example *Marshall v Northumberland & Durham Property Trust Limited* [2022] UKUT 92

(LC) where the tenant had expertise such that if he had been consulted he would have made suggestions which would have resulted in the work being done more cheaply. As a result, dispensation was granted on condition that the cost to leaseholders was limited to the sum the landlord would have had to spend had the tenant been consulted.

The factual background and the proceedings in the FTT

13. The property known as 2, The Waterloo, Cirencester GL7 2PZ ("the property") is a mixed-use block comprising four self-contained commercial units on the ground floor and six residential units on the first and second floors. The appellant purchased the freehold of the property from a Mr Simche Teitelbaum on 22 December 2020 (that was the date of the transfer, in which payment of the purchase price is acknowledged). The appellant became registered proprietor of the property, which is registered under two title numbers GR272258 and GR187110, on 7 January 2022.

14. The respondents hold three long leases of the residential parts of the property; the first respondent holds a 125-year lease of two flats, granted in 2005, and the second respondent holds two 125-year leases granted in 2006, each of two flats. The leases contain standard provisions for the payment of a service charge calculated by reference to the landlord's expenditure on the property; one lease requires the lessee to pay 50% of the service charge while the other two leases each require the lessee to pay 12.5%. So the respondents together pay 75% of the landlord's costs in maintaining and repairing (etc) the property, leaving 25% of the expenditure to be met by the landlord itself or, if it lets the commercial units, by its commercial tenants. When the appellant bought the property the commercial units were not let and it was given vacant possession of those units.

15. Shortly after its purchase the appellant instructed David Partridge Limited, chartered consulting engineers, to inspect it and report on its condition. Mr Partridge later made a witness statement in the FTT proceedings and explained what he had found when he inspected in April 2021: an outward bulge on the north elevation, a number of cracks through mortar joints and stones, and clear indications that the movement in the property was likely to be ongoing so that it was in need of "urgent restraint". He took the view that movement had commenced many years previously, probably initiated by the removal of some internal walls. He advised the appellant to install structural steelwork frames.

16. The appellant also took advice from RPA Consultancy Ltd, whose director Mr Payne (who is also a director of the appellant) inspected the property and produced a report in April 2021 which advised that the property was in extremely poor condition; that asbestos was present and needed removal; and that "after decades of neglect the building was in a dangerously poor state of repair and there are several issues that must be rectified immediately".

17. Unsurprisingly the appellant set to work to stabilise the structure of the property and to carry out a range of works identified as necessary in the reports of Mr Partridge and Mr Payne; in the course of that work (as so often happens) further problems were discovered and remedied. Work was substantially completed in September 2021 although some asbestos removal remained to be done; it was finished in 2023 before the FTT hearing in May.

18. The appellant did not comply with the consultation requirements but it did not entirely neglect them. On 7 May 2021, after work had started, the appellant's agents sent out a notice of intention to do the works. It received observations from the respondents to the effect that the work was not necessary. Relying on the reports from Mr Partridge and Mr Payne it

decided to go ahead. It gave the respondents notice about estimates in September 2021 (by which time the works were finished, or nearly so). They did not comment.

The proceedings in the FTT

19. In January 2023 the applicant applied to the FTT for dispensation from the consultation requirements in respect both of the work done from March to September 2021 and of the later asbestos removal. Its Statement of Case explained the contents of Mr Partridge's and Mr Payne's reports and set out the work that it undertook in 2021 and the additional work that was required following problems revealed by those works. It said "Due to the emergency nature of the Works and the unforeseen Additional Works, the Applicant was unable to comply with the consultation requirements prior to their commencement and completion."

20. The appellant in its Statement of Case went on to explain the extent to which it had complied with the consultation requirements and set out the relevant law on consultation and dispensation. Exhibited to the Statement of Case were the two reports as well as information about the works done and their cost, which was £123,150.52, and copies of the transfer to it of the freehold and of the registers of title.

21. The appellant also filed a witness statement by Mr Partridge in which he explained the content of his report in April 2021 and the work that he had recommended.

22. The FTT gave directions on 3 February 2023, which required the applicant (the present appellant) to serve the proceedings on the respondents, and required the respondents to complete a reply and to say what it would have done differently if the applicant had complied with the consultation requirements.

23. The respondents filed a statement of "Objections to the Application" in which they said that the applicant was not the freehold owner; the freehold owner was, it said, Eastacre Estates Limited (of which the respondents' representative, Mr Waites is a director). It seems that Mr Teitelbaum bought the property from National Westminster Bank as mortgagee in possession. The respondents said that the bank was not entitled to sell. I need hardly say that that was not relevant to the dispensation application. What the respondents said about the works was that they were not advised about the detail of the works and that the works were unnecessary.

24. The FTT conducted a hearing, sitting as a panel of three: a judge, a surveyor member and (I think) a lay member. I have been provided with the transcript of the hearing. I have to summarise the way the hearing was conducted in order to provide context for the FTT's findings.

25. Following counsel's opening, the panel took exception to the fact that the appellant's Statement of Case was verified by a statement of truth by the appellants solicitor (despite that being normal practice in the FTT and indeed in this Tribunal), and required a director of the appellant to give evidence and verify the contents of the appellant's pleadings. Ms Melanie Meigh was present and confirmed the truth of the Statement of Case. The panel then asked the respondents' representative if he wanted to ask Ms Meigh any questions ad he did not. At that point therefore the appellant had produced evidence of the work that had been done, of the reasons for doing it, and of the extent that it had followed the consultation procedure and that evidence was uncontested.

26. The panel then cross-examined Ms Meigh for most of the rest of the day. I use the word "cross-examination" deliberately; this was not simply the panel members asking questions about matters they might not have understood from the bundle. It was very much a challenge to what was said in the appellant's Statement of Case. The panel repeatedly asked Ms Meigh to justify the assertion that the work was urgent. Ms Meigh of course had not anticipated having to give evidence, and had to answer detailed questions about engineering issues. Ms Bloomfield suggested that Mr Payne, the other director of the appellant, who was present at the hearing, would be in a better position to answer the FTT's questions but the FTT refused to allow him to give evidence.

27. At that point one of the panel members asked Ms Meigh if Mr Payne was also the director of RPA Consultancy Limited whose report was relied upon by the appellants; on confirmation that he was, the judge expressed concern that his report was "not exactly an independent report".

28. Mr Partridge was not able to attend the hearing because he was out of the jurisdiction, and therefore it was not possible for Mr Waites to cross-examine him. Mr Waites did not express any concern about this at the hearing.

29. In its decision of 4 May 2023 the FTT refused a dispensation. Its decision is very brief (despite a hearing lasting a full day). It appears to have refused the application for two reasons: first, that as the transfer of the freehold to the appellant had not been registered when the works were carried out, it was not entitled to enter the property to do the works and had no standing to apply to the FTT for a dispensation from the consultation requirements, and second because the works were not urgent. At its paragraph 19 the FTT said:

> "… the Applicants argues that the case of *Daejean Investments Ltd v. Benson* [2013] UKSC 54 states that dispensation must be given unless there is evidence of actual prejudice being caused to the Respondents and no such prejudice had been asserted or proved in this case. The Tribunal agrees that the Respondents have not addressed prejudice, but lack of prejudice does not correct the lacunae in the Applicants arguments as discussed above. First, they have a potentially insuperable problem in attempting to obtain a dispensation for works carried out to a property which they did not at that time own and secondly, they have not satisfied the Tribunal that the works were so urgent and necessary that they could not wait two or three months before being started."

30. The statement that the respondents "have not addressed prejudice" is puzzling and I think what is meant is "have not asserted prejudice". I have read the transcript of the hearing and it is clear that that was the case, and in its refusal of permission to appeal the FTT referred to the lack of prejudice to the respondent. I take it therefore that the FTT found as a fact that there was no prejudice to the respondents as a result of the failure to follow the consultation procedure in full.

31. In its closing paragraphs the FTT said:

> "22. In the present case the works which were done have been described by the Applicants as both structural and urgent. However, insufficient evidence has been produced to support this assertion, and the evidence that has been produced by Mr Payne is conflicted as he has a direct interest in the property. This interest was not

> declared to the Tribunal, and only became apparent at the Hearing. In addition to the reports from an independent surveyor and structural engineer detailing the works to be carried out the Tribunal would have expected to see full estimates for the proposed works and a schedule of works.
> 23.All the works are said to have been completed but there is no documentary evidence of their satisfactory completion.
> 24. Having considered the submissions made by the Applicants the Tribunal is not satisfied that they have demonstrated the urgency of the works nor explained in detail the extent or costs of those works.
> 25. Neither can it consider giving a retrospective dispensation in relation to a property which the Applicants did not own at the time when the works were carried out.
> 26.This is not therefore a situation in which the Tribunal considers it appropriate or reasonable to exercise its discretion under s20ZA in favour of the Applicants and accordingly refuses the Applicants' application."

The appeal

32. The appellants appeal, with permission from the Tribunal, on six grounds. Four are, together, decisive of the success of otherwise of the appeal; a further ground seeks the setting aside of some findings of fact; a final ground is that certain case management directions should have been given, and it arises only if the first four grounds fail.

33. I have been assisted by a comprehensive skeleton argument from Mr Auld and Ms Bloomfield. All I have from the respondents is a statement of case in the appeal, which complains that the works were unnecessary, asks the Tribunal to make a number of orders which it cannot make in this appeal (for example, to pass management of the building to the leaseholders), and does not address any of the grounds of appeal save for a brief comment about prejudice which I shall mention in due course.

34. I take the first two grounds together, and then the second two:

(1): The FTT was wrong to hold that a landlord whose title has not been registered cannot enter and do works on the property without the legal owner's permission

(2) The FTT was wrong to hold that the appellant could not apply to the FTT for a dispensation prior to registration of its title

35. The FTT said:

> "16. By s27(1) Land Registration Act 2002 title to registered land does not pass until registration which means that at the time when the Applicants carried out the work at the property, they were not the legal owners of the property. They owned only an equitable interest which would not entitle them to enter and do works on the property without the legal owner's permission nor to serve a s20 notice or commence legal proceedings in their own name. There is no evidence that they had either sought or obtained the legal owner's permission before carrying out the works.

> 17. The Tribunal is not impressed by the Applicant's arguments that as equitable owners of the property the Applicants were entitled to do the works without consent of the registered proprietor.
>
> 18. It appears therefore that the Applicants had no locus standi either to do the works or to make a s20ZA application prior to their registration of title on 07 January 2022 by which time the works had been completed It is noted that the Applicant's application is dated 31 January 2023. They are therefore making an application retrospectively to dispense with consultation for works which they carried out to a property when they did not own it. The Tribunal cannot condone this action."

36. At its paragraph 25 the FTT added that it could not "consider giving a retrospective dispensation in relation to a property which the applicants did not own at the time when the works were carried out."

37. These paragraphs demonstrate a misunderstanding of the law by the FTT.

38. There is almost invariably a gap – known as the registration gap – between the completion of a purchase of land by the execution and delivery of a transfer, and its registration at HM Land Registry. The length of the gap will vary with HM Land Registry's workload, and with other factors such as the need to answer requisitions. But there will always be a gap, and until the purchaser's title is registered, as the FTT said, the legal estate does not pass to the purchaser.

39. During the gap the vendor holds the legal title on a bare trust for the purchaser. As a bare trustee the vendor has no power to make decisions about the property and must act at the direction of the purchaser.

40. Section 24 of the Land Registration Act 2002 says:

> "A person is entitled to exercise owner's powers in relation to a registered estate or charge if he is-
>
> (a) the registered proprietor, or
>
> (b) entitled to be registered as the proprietor."

41. The practical effect of that is well known to anyone who has bought a house and to conveyancers: on completion day the transfer is signed and dated, the keys are handed over, and the purchaser moves. The property belongs in equity to the purchaser, and to say that at that stage it is not the owner of the property both flies in the face of everyday reality and betrays a failure to understand equitable ownership. True, there are just a few things the equitable owner cannot do in the registration gap, such as giving notice to quit; but entering the property is not one of them.

42. As I said above the upper floors of the property were subject to long leases, and the appellant had vacant possession of the commercial units on the ground floor. It was entitled to enter the ground floor at will; so far as the long leasehold property was concerned it was able to exercise whatever rights to enter were reserved to it, as landlord, by the leases. Equally it took on, at completion, all the landlord's obligations to maintain the property, and took the

benefit of the tenant's covenants to pay the service charge (section 3 of the Landlord and Tenant (Covenants) Act 1995, codifying the common law of privity of estate).

43. So the appellant's right to take possession of the property and carry out the work cannot be in doubt.

44. Turning to ground 2, equally there can be no doubt about its standing to apply for a dispensation under section 27A of the 1985 Act. Mr Auld pointed out that section 30 of that Act states that for the purposes of the service charge provisions a landlord "includes any person who has the right to enforce payment of a service charge", and that that provision although intended for the protection of management companies is also apt to cover an equitable owner. I would put it more strongly than that; the owner of the property, albeit in equity and not yet at law, is the landlord. Section 18 of the 1985 Act defines service charges by reference to a landlord's costs, and an unregistered purchaser, for whom the legal owner holds on a bare trust, is the landlord in all senses relevant to the recovery of service charges imposed for the recovery of the landlord's costs.

45. Grounds 1 and 2 succeed.

(3) Can a lack of urgency be a reason to justify the denial of an application?

(4) Was the FTT wrong to refuse to grant dispensation where it found there wa no prejudice?

46. In the course of the hearing the judge said to Ms Meigh:

> "We need to see that these works were so urgent and immediate that they had to be done before you could, possibly, even send one letter to the respondents."

47. On the basis of that idea the FTT then subjected Ms Meigh to a cross-examination lasting some hours. I have quoted above (my paragraph 23) what the FTT said about urgency in paragraph 19 of its decision. Its thinking is further elaborated in paragraph 13 of its refusal of permission to appeal:

> "[In its grounds of appeal] the Appellant asserts that the lack of prejudice to the Respondents effectively precludes the Tribunal from denying the grant of the order to the Appellant. Lack of prejudice is an important factor which the Tribunal takes into account on exercising its discretion. It cannot however dominate in a situation where the basic right to an order has not been established. The Tribunal re-emphasises that grant of a dispensation order is not merely a rubber stamp available on payment of a small fee."

48. The idea that if the works were not urgent the appellant had not established the "basic right" to a dispensation is a misconception. There is no requirement of urgency in section 20ZA. Nor, for that matter, is there a "basic right" to a dispensation; it is a matter of discretion; but to impose a precondition that is not in the statue is to exceed the bounds of that discretion.

49. The Supreme Court in *Daejan* has made it clear that whether there was prejudice to the tenant is "the main, indeed normally, the sole question" for the FTT. The only mention of urgency in *Daejan* is in paragraph 56 where urgency is given as an example of a reason why a landlord might want to apply for dispensation before doing the work. That urgency is not

a pre-condition for dispensation is abundantly clear from *Daejan*, and should be equally clear from decisions of this Tribunal (such as *Marshall v Northumberland & Durham Property Trust* [2022] UKUT 92 (LC) and *Lambeth LBC v Kelly* [2022] UKUT 290 (LC))

50. Whether or not the FTT was right to find that the works were not urgent is not directly in issue in this appeal, although I comment on it further under ground 5. It was clearly wrong to hold that lack of urgency can be a reason to justify the denial of a dispensation.

51. The absence of a requirement of urgency does not make dispensation "merely a rubber stamp available on payment of a small fee". The FTT was perhaps concerned that if dispensation is too easy a landlord might make a deliberate decision to go ahead without consulting and then seek dispensation, but that is an unrealistic concern. An application to the FTT for a dispensation is not cheap; it costs not only the FTT's fee but also the time and (usually) legal fees incurred in making the application, together with the expense of complying with the FTT's directions and attending the hearing. A conscious decision to go ahead without consultation and then seek dispensation would be a high-risk strategy; if the failure to consult is found to have prejudiced the tenants the consequences could be seriously expensive. The penalty for not consulting, in terms of the restriction of the right to recover service charges, is severe and there is no need for the FTT to create further hurdles for the landlord to surmount.

52. As to the fourth ground, as I said above (paragraph 30) the FTT found as a fact that there was no prejudice to the tenant arising from the failure to follow the consultation process in full or at the proper time. The respondents did not suggest in the FTT that there was any prejudice. In their statement of case in the appeal the respondents said that they were prejudiced by "criminal theft and damage" carried out by the appellant. No evidence of such was produced in the FTT, and there was no finding to that effect by the FTT. The respondents made various allegations to the FTT about the necessity for the work and the quality of work done, but again produced no evidence.

53. Therefore in view of the lack of prejudice to the tenant arising from the failure to consult properly it is impossible to see any reason why dispensation was not given.

54. Grounds three and four therefore succeed; the FTT was wrong to regard urgency as a precondition to dispensation, and in light of the lack of prejudice to the respondents it should have granted one.

55. Those four grounds together mean that the appeal succeeds and the FTT's decision is set aside.

56. That makes it unnecessary for me to deal with the sixth ground of appeal, which arose only if the Tribunal had found that the FTT was correct to find that the appellant was not entitled to work on the property without the vendor's consent after completion of its purchase and before registration.

(5) Findings of fact

57. Although the points raised under this ground make no difference to the outcome of the appeal, they are points that cause the appellant concern and it is entitled to a decision on them. There are three findings of fact that the appellant seeks to challenge. The Upper Tribunal will not normally interfere with findings of fact, because the FTT saw and heard

the witness and was in the best position to decide; but it will do so if the appellant can show an error of law or an irrationality, such as a finding made against the weight of the evidence. That is what the appellant says happened here.

5(1) Did the appellant give a proper explanation of the extent and cost of the works?

58. As we saw at paragraph 31 above the FTT said at its paragraph 24 that the appellant "had not explained in detail the extent or costs of the works." The appellant says that this is incorrect and points to the following material that was before the FTT:

    a. Grounds for Seeking Dispensation

    b. Reply to Objections

    c. The Report of Mr Payne

    d. The evidence of Mr David Partridge

    e. Schedule of Work

    f. Spreadsheet of Estimates, Accepted Estimates and Final Costs

59. This material is all in the appeal bundle. Whilst the appellant's pleadings in the FTT (items a and b above) did not themselves specify in detail the work done, nor mention its cost, the documents exhibited to the pleadings (the rest of the items above) did. The Schedule of works, and the schedule of estimates and final costs are particularly detailed and gave the FTT all it needed to know. The FTT's attention was drawn to them, and particularly to the final cost, in the course of the hearing. The finding that the appellant did not give sufficient explanation of the works or of the cost was made against the weight of the evidence and is set aside.

5(2) Was there satisfactory evidence of completion of the works?

60. As we have seen, the FTT at its paragraph 23 said that there was no documentary evidence of the satisfactory completion of the work. Why that was a concern for the FTT is not understood. There was no need for the FTT to make any decision about whether the works had been completed, nor whether they were satisfactory.

61. The appellant points out that the FTT bundle included a Building Regulations Completion Certificate, and Electrical Installation Certificate, and a Fire Safety Certificate. They are all in the appeal bundle. Again the FTT's finding was made against the weight of the evidence and is set aside.

5(3) Was the FTT wrong to dismiss the report and schedule of works of Mr Payne?

62. At paragraph 6 of its decision the FTT said:

> "A report was prepared by Mr Payne of [RPA consultancy Limited], a company associated with the Applicant company, which recommended a series of works to be carried out some of which were said to be urgent or which should be commenced immediately. The Applicants rely on the findings of this report to justify the commencement of the works prior to issuing s20 documentation which

> they admit was in part non-compliant with the requirements of the section. The Tribunal is not satisfied that this report gives an independent and unbiased view of the proposed works because Mr Payne is also a Director of the Applicant company. He did not give evidence at the hearing."

63. Later at paragraph 12 the FTT said:

> "[The appellant] insist that it was necessary to start the works immediately because the building was likely to collapse. Although the words 'urgent' 'immediate' and 'necessary' do appear in Mr Payne's report (see above para 7) the Tribunal prefers the more moderate approach taken by Mr Partridge who agrees that some works are urgent but denies the fragility of the structure of the building. The Tribunal takes the view that none of the works undertaken by the Applicants could not have waited for the 2-3 months during which a proper s20 procedure could have been carried out.
> 13. Ms Meigh a Director of the Applicants, an established property company, gave evidence on their behalf. She conceded that Mr Payne had a conflict of interest caused by his Directorships of both the Applicant company and the company carrying out the survey of the property."

64. At paragraph 22 the FTT said:

> "In the present case the works which were done have been described by the Applicants as both structural and urgent. However, insufficient evidence has been produced to support this assertion, and the evidence that has been produced by Mr Payne is conflicted as he has a direct interest in the property. This interest was not declared to the Tribunal, and only became apparent at the Hearing."

65. It is difficult to understand exactly the status of what the FTT was saying about Mr Payne; I take it as a finding of fact that he had a conflict of interest, and that as a result of that conflict the FTT did not accept what his report said about the urgency of the works. There appears also to be criticism of the appellant for not disclosing that "conflict of interest" before the hearing.

66. The first thing to say about the FTT's findings in relation to Mr Payne is therefore that they were irrelevant to the decision it had to make. The FTT was under the misapprehension that the appellant had to prove that the works were urgent; it did not, and therefore it was not necessary to make any findings about Mr Payne's report.

67. Moreover, and more seriously, what the FTT said about Mr Payne betrays a misunderstanding of the concept of conflict of interest. Mr Payne was not a witness. He made, or rather his company made and he wrote, a report to the appellant about the condition of the building. The fact that he was a director of the appellant and of RPA Consultancy Limited does not make that the slightest bit improper. The FTT did not identify the conflict that it was concerned about; this was not a case where an expert witness has a relationship with the party calling him or her, so as to create a conflict between the duty to the client and the duty owed to the court or tribunal. If the FTT thought that Mr Payne's interest as director of the appellant might lead him to exaggerate the urgency of the work so that the appellant might get away with not consulting, that is fanciful and lacks any sense of commercial reality.

68. The appellant had bought a property which was – as I can see from photographs in the bundle – in a shocking state. For Mr Payne as director of the appellant to produce a professional report through RPA Consultancy Limited was prudent and proper, and the appellant also had a report from Mr Partridge.

69. As to the implied criticism that the appellant did not disclose the conflict of interest, I can see no basis for that. I do not think there was any intention to conceal the fact that Mr Payne was a director both of the appellant and of RPA Consultancy Ltd; I infer that the point was not flagged up because it did not occur to anyone that there was a problem.

70. The FTT's finding that Mr Payne had a conflict of interest is set aside.

71. The FTT allowed that finding to cloud its view of Mr Payne's report and therefore of the appellant's case, which the FTT thought depended upon a judgment as to whether or not the work had been urgent. The weight of the evidence, seen in both Mr Partridge's and Mr Payne's reports, indicated that much of the work was urgent and the FTT's rejection of that evidence was irrational. But as I have already said, urgency was not a precondition. The appeal has succeeded and it is not necessary to go any further.

72. By way of postscript to this ground I observe that the FTT's misunderstanding about conflict of interest would not have arisen had the FTT not adopted an extraordinary procedure, both in insisting on hearing evidence from Ms Meigh who had not made a witness statement, and in cross-examining her when her evidence was not contested by the respondent. That was unfair to her and to the appellant, and led the FTT into further erroring its consideration of the status of Mr Payne.

Conclusion

73. In conclusion, for the reasons I have given the appeal succeeds. The Tribunal substitutes its own decision for that of the FTT; in light of the FTT's unappealed finding that the respondents were not prejudiced by the incomplete consultation the appellant is granted a dispensation from the section 20 consultation requirements in respect of the 2021 works and the later removal of asbestos; I have asked counsel to draft an order which specifies the extent of the work by reference to the material given to the FTT.

Upper Tribunal Judge Elizabeth Cooke

4 March 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.