FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HB/LDC/2020/0044
Property	:	Cuthbert House, 149 Wick Road, Bristol, BS4 4HH
Applicant	:	Cyntra Properties Limited
Representative	:	Pembroke Property Management
Respondent	:	
Representative	:	
Type of Application	:	To dispense with the requirement to consult lessees about major works
Tribunal Member(s)	:	Judge J. Dobson
Date of Decision	:	29th July 2020

DECISION

© CROWN COPYRIGHT

Decision

1. The Applicant is granted dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act in respect of major works to emergency works to deal with leaks including a leak from the septic tank. The Tribunal has made no determination on whether the costs of the works are reasonable or payable.

The application and the history of the case

2. The Applicant applied for dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act.

3. The Tribunal gave Directions on 1st July 2020, explaining that the only issue for the Tribunal is whether, or not, it is reasonable to dispense with the statutory consultation requirements and is not the question of whether any service charge costs are reasonable or payable. The Directions Order listed the steps to be taken by the parties in preparation for the determination of the dispute, if any.

4. The Directions stated that the Tribunal would proceed by way of paper determination without a hearing pursuant to of the Tribunal Procedure Rules 2013, unless any party objected. There has been no objection to determination of the application on the papers and indeed agreement from each Respondent who replied.

5. This is the decision made following that paper determination.

The Law

6. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations provide that where the lessor undertakes qualifying works with a cost of more than £250 per lease the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum unless the required consultations have been undertaken or the requirement has been dispensed with by the Tribunal. An application may be made retrospectively.

7. Section 20ZA provides that on an application to dispense with any or all of the consultation requirements, the Tribunal may make a determination granting such dispensation "if satisfied that it is reasonable to dispense with the requirements".

8. The appropriate approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of *Daejan Investment Limited v Benson et al* [2013] UKSC 14.

9. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been

prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

10. The factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it. The Tribunal should be sympathetic to the lessee(s).

11. Where the extent, quality and cost of the works were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

> "I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be- i.e. as if the requirements had been complied with."

12. If dispensation is granted, that may be on terms.

13. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the Lessee will be or has been caused relevant prejudice by a failure of the Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted.

14. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

15. The effect of *Daejan* has very recently been considered by the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177 (LC), a decision published only several days ago, although that decision primarily dealt with the imposition of conditions when granting dispensation and that the ability of lessees to challenge the reasonableness of service charges claimed was not an answer to an argument of prejudice arising from a failure to consult.

Consideration

16. The Applicant explained that the property is a purpose-built block of 5 flats. A sample lease was provided with the application ("the Lease").

17. The Applicant explained in the application that the Applicant is responsible for repairs and other services. Those are defined in the Lease as "Services" and the expense for dealing with such being defined as "Service Costs". The Applicant further is responsible for the collection of service charges, defined in the usual sort of manner and described as the "Tenants Proportion of the Service Costs", from the lessees. The relevant provisions are contained in the definitions within clause 1.1 of

the Lease, in the Fourth and Sixth Schedules and in Parts 1 and 2 of the Seventh Schedule**.**

18. The application was it is stated by the Applicant made because in February 2020, emergency works were required due to a leak being reported which appeared to be emanating from the building. The application states that a contractor was instructed to attend to site to investigate and that the contractor could see that the septic tank was overflowing. Some 2500 gallons of effluent waste are stated to have been removed by the contractor. Related work was undertaken. The pump motor was tested and confirmed as defective and so a replacement unit was ordered. The contractors re-attended and the new pump installed, with appropriate related work being dealt with. The works were completed on or about 25th February 2020. 13 pages of relevant photographs have been submitted.

19. The Applicant asserts that the nature of the situations and consequent health and safety considerations prevented the ability to consult ahead of undertaking the works, stating that if the works had been placed on hold whilst leaseholders were consulted, the communal areas would have been flooded with faeces and unsanitary waste. Further, the Environmental Health department from the Local Authority had been in touch to ensure works were being actioned. The total cost of the works to the septic tank is stated to have been £6552 including VAT, where each leaseholder contributes 20% towards service charges.

20. The Applicant's representative stated in a letter to the Tribunal dated 27th July 2020 that no objection to the application was received by the Applicant from any of the lessees. The only Respondent who responded, stated that he does not wish to oppose the application.

21. None of the Respondents therefore assert that any prejudice has been caused to them. The Tribunal finds that nothing different would be done or achieved in the event of consultation, except for the inevitable delay and greater problems to address.

22. Accordingly, the Tribunal finds that the Respondents have not suffered any prejudice by the failure of the Applicant to follow the consultation process.

23. The Tribunal consequently finds that it is reasonable to dispense with all of the formal consultation requirements in respect of the major works to the roof of the building.

24. This decision is confined to determination of the issue of dispensation from the consultation requirements in respect of the qualifying long-term agreement. The Tribunal has made no determination on whether the costs are reasonable or payable. If a leaseholder wishes to challenge the reasonableness of those costs, then a separate application under section 27A of the Landlord and Tenant Act 1968 would have to be made.

RIGHTS OF APPEAL

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

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

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

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