FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/40UE/LDC/2020/0040
Property	:	Castlemoat Place, Corporation Street, Taunton TA1 4BB
Applicant	:	Ash Management (Taunton) Limited
Representative	:	Blenheims Estate & Asset Management Ltd
Respondent	:	Leaseholders
Representative	:	
Type of Application	:	To dispense with the requirement to consult lessees about major works
Tribunal Member	:	Judge J Dobson
Date of Directions	:	16th 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 pipework and related matters to the building. 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 22nd June 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 Regulations made pursuant to the Act 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 in advance or 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 pursuant to section 20ZA of the Act "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 mixed tenure building containing 52 apartments and 5 commercial units.

17. The current application was made to facilitate repairs to the communal pipes that serve the communal heating and hot water system to the apartments and that works are required urgently as further failure could result in lack of hot water to apartment, stating that some residents are

key workers and hospital workers. The application states that the works have not, or at least had not, yet been carried out. The application does indicate an expectation of the work being undertaken in the next 3 weeks as from the date of the application. That time period has elapsed. It is not clear whether the work has therefore been undertaken or awaits this decision.

18. The specific work is detailed in the application and is said to consist of work to repair leaking pipe fittings to the second floor, other leaking pipework to the third floor and a leaking joint in the plantroom. It is not clear from the application whether the 3 elements are connected. The application states that 2 engineers will need to attend the site for a single working day to refill and vent the system and will need access to each of the flats. It appears that is separate to the work to the leaks themselves, although the application does not explicitly say so.

19. There is no information in the bundle as to the estimated costs of the major works. Given the number of units, the cost would need to be in excess of £13,000 even were it divided between the lessees of the apartments alone. That is not immediately obvious from the information provided as to the work to be undertaken. However, the Tribunal works on the premise that the cost is such as to meet the criteria of major works under the Act and the Regulations, hence the application made.

20. The Applicant has provided pages from a sample lease ("the Lease") of a flat in the building. That is a tripartite lease in which the Applicant or such other management company as the landlord shall appoint is identified under the description "Other Parties" and which is thereafter referred to as the "Management Company".

21. It is apparent from the Lease that the Applicant is responsible for repairs to, amongst other things, the conduits and common parts and the collection of service charges, pursuant to the provisions of the Lease. There are relevant provisions contained in relevant parts of clauses 2 and 3 and clause 5.2. The share payable by the lessees of the flat is set out in clause 9 of the "Particulars" and in clause 1.17.

22. The copy of the Lease in the determination bundle is not complete. However, given the contents of the (overwhelming majority of) pages that have been provided and particularly given the nature of this application and that the Tribunal is not asked to determine whether the cost of the major works is payable, in terms of the lessees being liable for the costs and the costs being reasonably incurred and reasonable in amount, but rather to consider dispensation, the Tribunal is able to answer the question before it in the absence of the remainder of the Lease.

23. Three Respondents have replied. Two of those agree to the application for dispensation: one does not, Ms McDermott. The majority of the lessees have not responded at all.

24. The 5 matters set out by Ms McDermott are as follows, quoting verbatim:

    1. ***It is unnecessary.*** *The application is dated 04/06/20. I was sent a Notice of Intention dated 15/06/2020. I have not opposed this. Since the consultation period ends on 14 July I see no reason to involve the First Tier Tribunal.*
    2. ***Additional costs.*** *It would appear that Ash Management (Taunton) Ltd has already paid a fee of £100 and is using the services of Blenheims to process the application. Such costs will, no doubt, be passed on to leaseholders via service charges.*
    3. ***Delay.*** *This application may well delay work which I understand to be critical. This need has been known for some time and whilst I understand that Covid 19 may have delayed work, really this should have been started a long time ago and contingency plans put into place to maintain hot water supplies.*
    4. ***Precedent.*** *It seems to me dangerous to set a precedent of bypassing lessees who will be expected to pay for major works through the service charge. I would expect such measures to be taken should an imminent danger arise not about a known problem.*
    5. ***Consultation.*** *A notice of intention allows for lessees to propose suitable contractors which is a method of monitoring costs and expenditure. This application removes this right.*

25. The Applicant responded to those 5 points by way of a letter dated 7th July 2020, in rebuttal of the assertions of Ms McDermott. The Tribunal accepts most of that said by the Applicant.

26. Whilst Ms McDermott has referred to the Applicant's Notice of Intention, that comprises only the first stage of the consultation process, which would otherwise have some time yet to run. The Applicant would necessarily be required to undertake the remainder of the consultation process in the absence of dispensation being granted. It is the completion of the consultation process which would cause delay, including in identifying contractors willing to undertake the work from whom to obtain estimates, rather than this application for dispensation doing so. Any such delay cannot be a positive and it appears at least possible that it may add to difficulties and to costs.

27. The second stage of the consultation process would have involved the Applicant in obtaining a minimum of 2 estimates. However, there is no specific assertion that the intended contractor is likely to charge an unreasonable sum or otherwise that the Applicant would have obtained a cheaper estimate that it would have been likely to have accepted. Indeed, the comments at point 5 of the Applicant's reply to Ms McDermott's points indicate that the Applicant would have been very likely to proceed with Buswells, not least because of potential difficulty to finding an alternative contractor, thereby incurring the same cost as it will if dispensation is granted. In terms of the reference by Ms McDermott to not having opposed that Notice, the Tribunal understands her to mean that she has not made observations and has not nominated

anyone from whom the Applicant should try to obtain an estimate for carrying out the proposed works. Neither has any other lessee.

28. Whilst the high likelihood is that Ms McDermott is correct in saying that the application fee paid for the application to this Tribunal and fees to Blenheim will be payable through the service charge. Indeed, the Applicant's reply indicates that to be the case, but where the Applicant contends its approach to be reasonable. However, that is no reason to refuse to grant dispensation otherwise appropriate.

29. There is no identifiable prospect of a dangerous precedent being set. The Applicant has made use of a procedure set down by statute to facilitate dispensing with consultation in appropriate cases. The criteria does not require there to be an imminent danger. The Applicant will have to make an application to this Tribunal on any subsequent occasion on which it wishes to dispense with consultation and demonstrate that the criteria on which dispensation can be granted have been met.

30. It is therefore not apparent that there would have been any change to the outcome in the event of the consultation process being completed, other than a delay in the work being able to be undertaken. Accordingly, the Tribunal finds that the Respondents have not suffered any prejudice by the failure of the Applicant to follow the consultation process.

31. 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 pipework and related works to the building.

32. This decision is confined to determination of the issue of dispensation from the consultation requirements in respect of the qualifying works. 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.