FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00FN/LDC/2021/0009**
HMCTS	:	**P:PAPERREMOTE**
Property	:	**Apartments 1-27, 4 Baseball Walk Leicester LE4 5HX**
Applicant	:	**Nottingham Community Housing Association Ltd**
Representative	:	**None**
Respondents	:	**Leaseholders of Apartments 17, 18, 22, 23, 24, 25 and 26 at 4 Baseball Walk Leicester**
Representative	:	**None**
Type of Application	:	**An Application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of specified Section 20 consultation requirements**
Tribunal Members	:	**Nicholas Wint FRICS (Chair)** **Judge David R. Salter**
Date of Decision	:	**25 November 2021**

DECISION

Decision

1. The Tribunal grants dispensation from all or any of the consultation requirements of Section 20 Landlord and Tenant Act 1985 in respect of the works undertaken by the Landlord.

2. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Background

3. This is an application made by the Landlord ("the Applicant") to the First-tier Tribunal (Property Chamber) (FTT) dated 20 May 2021 for an order to dispense with certain consultation requirements provided for by section 20 of the Landlord & Tenant Act 1985 ("the Act"), as amended by the Commonhold and Leasehold Reform Act 2002. This section together with the Service Charges (Consultation Requirements) (England) Regulations 2003 ('the Regulations') requires a landlord to consult with lessees before placing a contract to undertake any 'qualifying works' that would cost each tenant more than £250.00. The Regulations set out a timetable for the consultation and identify the procedures to be followed in the course of the consultation.

4. The Act envisages that there may be occasions where for various reasons a landlord may be unable to consult, for example in cases of emergency. In such circumstances there is provision in section 20ZA of the Act for a landlord to apply to the Tribunal for 'dispensation' to override all or some of the consultation requirements. An application may be made before or after works are carried out.

5. The only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. This application does not concern the issue of whether any service charge costs will be payable under the terms of the leases or whether they are reasonable.

6. The Tribunal understands that the Applicant seeks dispensation against 7 leaseholders as the remaining 20 tenants are not leaseholders and are not therefore part of the section 20 process.

7. In this case, the Applicant applied for dispensation from 'the full consultation process' in respect of acknowledged 'qualifying works' on the grounds that:

   "*It became apparent that on the 19th August 2020 that the lift at 4 Baseball Walk was broken. Following an initial assessment by NHCA's lift contractors it was feedback that there was damage to the lift doors which were unable to be repaired. The lift doors installed as part of the original installation were no longer made and so NHCA needed to replace all the lift doors on all floors to ensure they were compatable with each other. At this stage, NHCA decided that the parts needed to be ordered and entered into an agreement with Callandine Ltd in September 2020. NHCA wrote to the leaseholders to advise of the matter and a copy of what was sent to all leaseholders is supplied as document B. The final costs are £22,044 which equates to £816.44 per leaseholder, rather than £738.30 which was the estimated costs that NHCA provided to leaseholders in September 2020. I have supplied one lease with the application (Document C) but can supply more if needed. They all have the same terms for this scheme. NHCA used their own specialist approved lift contractor to minimize timescales and to give NHCA confidence that they were*

compliant in regard to health and safety matters. The works were completed in January 2021. Please find enclosed a list of names and addresses of service charge payers in regard to this matter".

"NHCA considered doing a full consultation. However, due to concerns raised by customers, the timescales for ordering, manufacturing and receiving the parts and that there were no other lifts in the building it was decided not to delay in ordering the parts. We did write to all leaseholders on the 18th September to advise of the situation and offer a period to the 22th October for them to supply observations. We received no observations. We indicated an anticipated cost to leaseholders of approximately £738.30 per leaseholder. Once all work has been completed this is now £816.44 per leaseholder. The main reason for the increased cost is due to some preliminary works in regard to the works that had not been anticipated as part of the initial communication to the leaseholders."

"NHCA are conscious that we have not carried out a full consultation process and this is because we wanted to be able to ensure that our leaseholders had a working lift as quickly as possible. If we had carried out a full consultation process, the lift would have continued to be out of order for at least 2 months, further than it was. I believe that the fact that NHCA didn't receive any observations from the 7 leaseholders reinforces that the leaseholders are understanding of the reasons why we could not do a full consultation".

8. By way of Directions dated 9 June 2021 the Tribunal directed the Applicant to send each leaseholder a copy of the application, the Directions and that the Landlord shall place a copy of them all in a prominent position in the common parts of the property. Further the Tenants who oppose the application shall complete the Reply Form and send it to the Tribunal and also send it to the Landlord with a statement and copies of any documents upon which they wish to rely. The Applicant has indicated that they are content with a paper determination and none of the Respondents have requested an oral hearing.

9. Due to the Covid-19 Pandemic, the Tribunal has not carried out an inspection of the Property. Accordingly, the Tribunal determines this matter on the written submissions of the parties with no inspection of the Property taking place.

10. In accordance with the Directions the Applicants provided the Tribunal with a copy lease in respect of Apartment 17, a copy of the letter issued to the leaseholders advising of the intention to carry out works to the lift, Invoices from Musson Joinery Ltd dated 26th November 2020 and 19th January 2021 and an Invoice from Calandine Lifts Ltd dated 14 January 2021. The total costs of these invoices amount to £22,044 inclusive of VAT. The Tribunal also requested and received a copy of the Head lease dated 20th October 2011.

11. The Tribunal did not receive any submissions from the Respondents.

The Lease

12. The Tribunal understands the lease in respect of Apartment 17 is identical to the other Respondents' leases. It was granted for a term of 125 years from and including 20th October 2011 and the Premises are described in Schedule 1 as shown edged red on the lease Plan, but specifically excludes the load bearing framework and all other structural parts of the Building, the roof, foundations, joists, and external walls of the Building and Service Media and machinery and plant within (but not exclusively serving) the Premises.

13. Under Leaseholder's Covenants (Clause 3) the Leaseholder is to pay Outgoings which is defined under Schedule 8 as:

'... all existing and future rates, taxes, charges, assessments, impositions and outgoings whatsoever (whether parliamentary or local) which are now or may at any time be payable, charged or assessed on property or the owner or occupier of the property'.

14. In addition, Clause 3(1) specifically provides for the Leaseholder to pay the Specific Rent and Management Charge.

15. Under Service Charge Provisions (Clause 7) the Leaseholder covenants with the Landlord to:

'... pay the Service Charge during the Term by equal payments in advance ...'.

16. Schedule 8 defines the 'Service Charge' as the Specified Proportion of the Service Provision which means the sum calculated in accordance with Clause 7.3 which is:

'... the sum computed by the Head Lessor in accordance with the terms of the Head Lease'.

17. The Head Lease describes the 'Apartment Communal Areas' as the parts of the Landlord's Property which are Areas:

'... not let to tenants or designed to be let to tenants and which are designated or provided by the Landlord from time to time during the Term for the common use and enjoyment of one or more of the tenants and other occupiers of or visitors to the Apartments including but not limited to:

(i) the entrance halls passages corridors, staircases and lobbies and landings of the Landlord's Property
(ii) all doors (including the entry doors, the internal doors within, or leading into the corridors or lobbies or stairwells or any other part of the Apartments Communal Areas, the exit doors)
(iii) windows (if any) in the corridors, lobbies, stairwells of the Apartments Communal Areas (and not forming part of any of the Apartments)
(iv) refuse disposal facilities
(v) lifts lift shafts lift lobbies
(vi) any other pedestrian access or circulation route within the Landlord's Property
(vii) Plant rooms plant and equipment and associated equipment and apparatus ...'.

18. Under Services (Clause 12) the Landlord covenants with the Tenant and the lessees:

'... to provide the Landlord's Property Services and the Apartments Services'.

19. Under Service Charge (Clause 13) the Tenant is in each Service Charge Year to pay the Service Charge Proportion of the Service Costs. The Service Costs are defined as being the proper and reasonable expenditure (including VAT) incurred by the Landlord (i) in procuring the Landlord's Property Services and the Apartments Services and (ii) in respect of the Additional Items.

20. The Services are defined in Part 1 of Schedule 1 and more particularly the Landlords Property Services as keeping in good and substantial repair, and (where beyond economic repair) reinstating, rebuilding, replacing and improving and renewing the Common Parts. Part 2 (2.1) further provides for the keeping in good and substantial

repair, and (where beyond economic repair) reinstating, rebuilding, replacing and improving and renewing the Common Parts and any equipment apparatus and facilities installed from time to time in the Landlord's Property or on the Building for the provision of services to one or more the tenants of the Landlord's Property

21. The Common Parts are defined as being those parts of the Landlord's Property which are not let to tenants or designed to be let to tenants and are designated or provided by the Landlord from time to time during the Term for the common use and enjoyment of one or more of the tenants or other occupiers or visitors of the Landlord's Property (as opposed to the Apartments only) including but not limited to:

    (i) stairs to and from the Designated Parking Area
    (ii) bicycle and bin stores
    (iii) ducts within the Landlord's Property
    (iv) plant rooms, plant and equipment and associated equipment and apparatus within the Landlord's Property.

22. The Tribunal is of the provisional view that the lease provides that the cost of repairing and maintaining the lift falls within the Applicant's repairing obligation and is a relevant cost. However, the Tribunal makes no decision as to the service charge costs being reasonable or that they are payable through the service charge and the Applicant remains able to challenge such costs by way of a separate application if required.

Relevant Law

23. Section 20 of the Act, as amended, and the Regulations provide for the consultation procedures that landlords must normally follow in respect of 'qualifying works' (defined in section 20ZA(2) of the Act as 'work to a building or any other premises') where such 'qualifying works' result in a service charge contribution by an individual lessee in excess of £250.00.

24. Provision for dispensation in respect of some or all such consultation requirements is made in section 20ZA(1) of the Act which states:

    'Where an application is made to a leasehold valuation tribunal (a jurisdiction transferred to the First-tier Tribunal) 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.' (*emphasis added*).

25. In *Daejan Investments Ltd. v Benson et al.* [2013] UKSC 14 (*Daejan)*, the Supreme Court set out the proper approach to be taken to an application for dispensation under section 20ZA of the Act. In summary, this approach is as follows:

    a. The Tribunal should identify the extent to which lessees would be prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the landlord to comply with the consultation requirements;

    b. That no distinction should be drawn between 'a serious failing' and 'technical error or minor or excusable oversight' on the landlord's part save in relation to the prejudice it causes;

c. The financial consequences to the landlord of not granting a dispensation are not relevant factors when the Tribunal is considering how to exercise its jurisdiction under section 20ZA; and

d. The nature of the landlord is not relevant.

26. Further, in exercise of its power to grant a dispensation under section 20ZA of the Act, the Tribunal may impose such terms and conditions as it thinks fit, provided only that these terms and conditions must be appropriate in their nature and effect.

27. For the sake of completeness, it may be added that the Tribunal's dispensatory power under section 20ZA of the Act only applies to the aforesaid statutory and regulatory consultation requirements in the Act and does not confer on the Tribunal any power to dispense with contractual consultation provisions that may be contained in the pertinent lease(s).

Submissions of the Parties

28. The Applicant's case was set out in the Application submitted by Carol Wright, Specialist Housing Manager, of Nottingham Community Housing Association the details of which are referred to above.

29. No evidence was submitted by any of the Respondents.

The Tribunal's Determination

30. The Tribunal has considered the reasons submitted by the Applicant, the relevant law and its knowledge and experience as an expert Tribunal. It has also specifically noted that none of the Respondents objected to the dispensation sought in the application.

31. It is clear and the Tribunal is satisfied from the information supplied by the Applicant that the works were urgently required to the lift of the subject Property.

32. Section 20ZA does not expand upon or detail the circumstances when it may be reasonable to make a determination dispensing with the consultation requirements. However, the Supreme Court in *Daejan* found that the Tribunal in considering whether dispensation should be granted must take into account the extent to which lessees would be prejudiced by a landlord's failure to consult.

33. There are essentially three stages in the consultation procedure, Stage 1 (Pre-tender stage; Notice of Intention), Stage 2 (Tender stage; Notification of Proposals including estimates) and, in some cases, Stage 3 advising the leaseholders that the contract has been placed and the reasons behind the same.

34. The dispensation sought in this matter is, in effect, a means for expediting the carrying out of this work in order to curtail any inconvenience and loss of amenity to the Leaseholders as well minimizing any health and safety concerns arising from the lift being inoperable for a considerable period of time. The Tribunal is therefore satisfied that the Applicant needed to attend to the works immediately and they were of sufficient urgency that it was necessary to dispense with the normal consultation requirements and that the works included the need to replace all the lift doors on all floors.

35. The leaseholders have been made aware of both the likely costs and the intention of the Applicant to seek a dispensation and none have indicated any objection to the application for dispensation. Applying the tests set out in section 20ZA and the

approach specified in *Daejan*, the Tribunal finds that the leaseholders would not be prejudiced by granting dispensation of the section 20 consultation requirements in the Act and in the Regulations to the extent sought in the application and that it would be reasonable to grant such dispensation. Therefore, dispensation is granted.

36. The Tribunal makes clear that it has only considered the issue before it, that is to say, dispensation from the statutory regime. This is not a determination of the reasonableness of service charges (Section 19) or liability to pay service charges (under Section 27A). This decision relates only to the dispensation sought in the application and does not prevent any later challenge by any of the lessees under sections 19 and 27A of the Act on the grounds that the costs of the works incurred had not been reasonably incurred or that the works had not been carried to a reasonable standard.

Appeal to the Upper Tribunal

37. If any party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such appeal must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

38. If the party wishing to appeal does not comply with the 28-day time limit, the party 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.

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

Nicholas Wint FRICS - Chair