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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAW/LDC/2017/085**
Property	:	**Princes House, Buckingham Court and Matlock Court, 46-52 Kensington Park Road, London W11 3BP**
Applicant	:	**P B M Flats Management Limited**
Representative	:	**Mr T Hymers and Miss R Clifford both of Burlington Estates and Mr N Pavey, Chartered Engineer of Pavey Engineering** **Others in attendance – Mr J Brendon Catchbroad Limited Freeholders, Mr D Newman and Mr P Knight both Directors of the Applicant Company,**
Respondent	:	**All the leaseholders of the above properties**
Representative	:	**Mr D Turrif and Mr S Perera** **Mr Clive Smith Lessee of Flat 103 Princes House as observer**
Type of Application	:	**To dispense with the requirement to consult lessees about major works/long term agreement**
Tribunal Members	:	**Tribunal Judge Dutton** **Mrs E Flint DMS FRICS IRRV**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 20th September 2017**
Date of Decision	:	**28th September 2017**

DECISION

DECISION

The Tribunal determines that it will grant dispensation from the totality of the consultation requirements in respect of the installation of gas supply network to the properties for the reasons set out below.

BACKGROUND

1. The Applicants, a tenants' owned management company, sought dispensation from the consultation requirements in respect of works to replace the existing oil fired boilers with gas. The application said that there were nine boilers in three blocks which were in a poor condition and indeed it seems that at least two were non-functioning. In order to meet the landlord's obligation under the lease to provide heating and hot water, it was said the boilers needed to be replaced. It was decided that gas would be more efficient but the estate was not served by a commercial supply sufficient to enable gas fired boilers to function.

2. To enable this to matter to proceed, an application had been made to Cadent the regional distribution network infrastructure provider and, we were told, the only supplier of gas pipework in the region, to arrange for the installation of a suitable gas supply to the buildings. It appears that the works have already been commenced at a price of £90,976.98.

3. Prior to the hearing of this matter we received two bundles of papers from the Applicants, represented by Burlington Estates, and a bundle of papers filed by Mr Turrif. He appeared to represent some nine additional leaseholders out of a total of 144. We noted the contents of the bundle of papers which included a supporting statement lodged by Burlington Estates explaining the need for the dispensation. It appears that in June a meeting was held with leaseholders when these works were discussed together also with a planned management programme going forward for a number of years. Letters had been sent to the leaseholders dealing with the replacement of the boilers and other issues, which we were told at the hearing could cost in the region of £700,000.

4. The papers included a quotation letter from Cadent Gas Limited, detailing the works to be done and confirming the price of £90,976.98.

5. The only issue we are required to determine is whether or not dispensation should be granted. Our decision has no impact on the sums claimed nor any other matters that might arise under section 19 and 27A of the Landlord and Tenant Act 1985.

6. Mr Turriff produced a document from Cadent headed "Cadent Alternative connections providers", which indicated there were other companies who would be able to undertake this work, which is somewhat contrary to the initial application.

HEARING

7. At the hearing, Mr Hymers told us that the Applicant had asked Mr Pavey, who was present, to undertake a commission survey which included the condition of

the boilers providing hot water and heating such survey being carried out in March of 2017. Mr Pavey, it was noted, is a Chartered Engineer of some 38 years' experience of dealing with works of this nature. The survey found that the boilers were in poor condition and that two had failed. Mr Hymers told us that this had been known for about 18 months when they had taken over the management of the development. He told us that the service contractor, Axon, was attending on an almost weekly basis to deal with difficulties and that there had been a recent failure of the pump in one block and no replacement was available for three weeks.

8. We were told that Cadent was now the most "elegant" and best provider and the natural selection to deal with this matter. An order had been placed and Cadent were now on site. We were told by Mr Hymers one of the primary reasons that Cadent had been asked to carry out the work, was that they were the primary provider for this type of work and for health and safety issues. It appears that Princes House should have the works of installation completed by 16th October and work the properties at Matlock and Buckingham was underway and should finish sometime thereafter. In any event, it was hoped that there would be at least one gas boiler installed in each block by Christmas and it was expected that there would be full installation between February and March of next year.

9. Mr Pavey explained further why Cadent were the contractors to be chosen. Apparently, they were the successors to National Grid in this area and were regulated by Ofgem and liable to pay compensation, indeed a small payment had already been made. He accepted that there were independent utility providers who could install but they would have to do so to standards which met Cadent's requirements as it would be Cadent who would adopt the pipework. The building has never had gas to this level although there appears to be some gas to enable cooking. As to the replacement from oil to gas, it was believed there could be a 40% saving on annual costs and that the capital cost could be recovered in some ten years.

10. In response Mr Turrif referred us to the Gas Act 1986 which in part had been superseded by the Utilities Act 2000. This merely confirmed that there were other suppliers than Cadent that could provide assistance. It is, we understand, common ground that the current gas supply to the building is insufficient to meet the requirements for the nine boilers.

11. Mr Turrif then went on to say that he had reviewed the jurisdiction of the Tribunal having until recently being relying on an outdated text book. The case of *Daejan Investments Limited v Benson and others [2013]UKSC14*, a Supreme Court decision delivered on 6th March 2013, had come to his attention and his view was that the Tribunal had no power to refuse dispensation. What he did say, however, was that prejudice is a matter that could be considered although there was no evidence available to us that such prejudice had occurred. He did however think that it would be reasonable to grant dispensation on terms which would allow the Respondents to obtain expert evidence as to costings, such expert evidence cost to be payable by the Applicant.

12. We were told by Mr Hymers that so far 80% of the monies required for the works had been recovered both from service charge contributions and reserve fund monies.

13. Finally, Mr Turrif told us that he was seeking a consultant to assist but had not been able to do so. There was no alternative solution or other evidence he could put to us. There had apparently been an inspection of the boiler room yesterday with Miss Clifford from Burlingtons but at the moment there is no expert available to the Respondent, nor other quotes from other contractors.

14. We were told also that the freeholder, Catchbroad Limited is a company owned by a number of lessees who acquired the freehold some time ago.

THE LAW

15. The law applicable to this matter is set out below and in reaching our decision we have considered the judgement of the Supreme Court in Daejan.

FINDINGS

16. We find that there is no doubt that other contractors could be utilised to carry out the works that Cadent were contracted to do. The application is, in that regard somewhat misleading. However, equally there appears to be no doubt that Cadent is the main contractor for this type of work in the locality. If, as we are told, they will be the party who adopts the pipework once installed, then clearly that adds another level of consultation and potential cost if a third party is used. As has been pointed out, Cadent are subject to Ofgem regulations, although we suspect that other contractors would also be so obliged. Further we have borne in mind that works had already been started because of the urgency in replacing the boilers with winter approaching. It is also relevant that only a small minority of the 144 leaseholders have objected to this application. We heard all that was said by Mr Pavey. Going "off piste" was his favoured phrase in seeking to establish that the use of another contractor to Cadent could create difficulties. We accept that for a job of this nature the Applicant would want to be sure that it was dealing with the best available and at a reasonable price.

17. Mr Turrif appeared to think that we had no rights to reject an application under section 20ZA. However, paragraph 41 of the Daejan decision the judgment of Lord Neuberger says as follows *"However, the very fact that section 20ZA(1) is expressed as it is, means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further, the circumstances in which a section 20ZA(1) is made could almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules."*

18. Lord Neuberger goes on at paragraph 44 to say *"Given that the purpose of the 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 requirements." The judgment went on to say at paragraph 54 *"In my view, the LVT is not so constrained when exercising its jurisdiction under section 20ZA(1): it has power to grant a dispensation on such terms as it thinks fit – provided, of course, that any such terms are appropriate in their nature and their effect."*

19. This of course is not a case where the landlord has failed to comply with requirements and proceeded to undertake work without any regard to the leaseholders. Here, dispensation is being sought, and was applied for, before the works have commenced. As we have indicated above, it seems to us reasonable that Cadent should have been used to undertake these works. The burden of identifying prejudice in our finding rests with the Respondents. No such evidence of prejudice has been put to us. Indeed, Mr Turrif said he had none. Further we do not think it appropriate for the Applicant to pay the Respondents costs of gathering any evidence to challenge the costs of the works in the future.

20. The Application was issued some time ago and the Respondents have had ample opportunity to have obtained alternative quotes to show the costs of Cadent were excessive. From July to September, some 6 weeks or so, should have been a sufficient period in which some evidence as to alternative costings could have been proffered. There is no scintilla of evidence before us to show prejudice, just unsupported assertions. Although Mr Turriff refers to three companies who have shown interest there is no compelling evidence in written format as to their ability to proceed and more importantly the costs of carrying out the work. Indeed a copy email from Mr Perera dated 30th August 2017 showed the lack of response the Respondents were receiving to enquiries. One company, Energy Assets, appeared to indicate by email dated 5th September 2017 that they could provide a quote, but at the hearing on 20th September nothing was available to us. Further we have no contradictory evidence to suggest that the works to replace the boilers is unreasonable, but that is probably a matter to consider in due course should the final costs be challenged.

21. We understand that full consultation is being undertaken in connection with the far larger cost element in respect of the actual replacement boilers where the leaseholders will obviously be able to consider alternatives if available to them. We, therefore, find that that dispensation should be granted for the installation of the gas pipework.

Judge: Andrew Dutton

A A Dutton

Date: 28th September 2017

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

The Relevant Law

Section 20 Landlord and Tenant Act 1985

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

20ZA Consultation requirements: supplementary

(1)Where an application is made to the appropriate 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.

(2)In section 20 and this section—

- "qualifying works" means works on a building or any other premises, and
- "qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3)The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a)if it is an agreement of a description prescribed by the regulations, or

(b)in any circumstances so prescribed.

(4)In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5)Regulations under subsection (4) may in particular include provision requiring the landlord—

(a)to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b)to obtain estimates for proposed works or agreements,

(c)to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d)to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e)to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6)Regulations under section 20 or this section—

(a)may make provision generally or only in relation to specific cases, and

(b)may make different provision for different purposes.

(7)Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.