FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00ML/LDC/2020/0076
Property	**:**	Ashdown, Eaton Road, Hove BN3 3AQ
Applicant	**:**	Ashdown Hove Limited
Representative	**:**	Stephen Fitzgibbon, Ashdown Management Company
Respondent	**:**	Brenda Taylor
Representative	**:**	Stephen Taylor
Type of Application	**:**	To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985
Tribunal Member(s)	**:**	Judge J Dobson
Date of Directions	**:**	7th December 2020

DECISION

Summary of Decision

1. **The Tribunal grants the Applicant dispensation from consultation requirements to the extent that the Applicant is not required to obtain and provide a further estimate within stage 2 of the consultation process.**

Background

2. The Applicant is the Management company for Ashown ("the Building"). The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 ("the Act") from part of the consultation requirements imposed on the landlord, or in this instance the Management Company, by Section 20 of the Act.

3. The Applicant explained in its application that it considers that new metering equipment needs to be installed in the Building, a purpose-built block of some 124 flats, in connection with the communal heating and hot water system. The Applicant stated that it wishes to use a contractor who, in addition to supplying and fitting the required meters, will also be able to supply the gas, maintain the system, and deal with billing. Only one contractor is said to have been found who fulfils these requirements. The Tribunal was asked to dispense with the requirement for estimates from two different contractors to be provided at stage 2 of the consultation process.

4. The Tribunal gave Directions on 12th October 2020. The Tribunal noted at the time of the Directions being given that the only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements and that, emphasised in the Directions, this application does not concern the issue of whether any service charge costs will be reasonable or payable, although the ability of the lessees to separately challenge the reasonableness of the service charges is not an answer to the need to consider the merits of the application for dispensation applying the appropriate legal tests.

5. The Directions stated that the application was to be determined on the papers without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected in writing to the Tribunal within 14 days of the date of receipt of the directions. The Respondent objected to the application and requested a hearing. The other lessees did not and so were removed as Respondents. The hearing was listed 4th December 2020 to be conducted remotely as video proceedings.

The Law

6. The 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 prospectively 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 "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. 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.

13. 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.

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

15. The effect of *Daejan* has recently been considered by the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177 (LC), 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.

The Lease

16. The bundle includes the lease ("the Lease") of Flat 111 ("the Flat") in the Building, originally granted on 19th July 1976. The Lease is tripartite, between the developer, Ashdown (Eaton Road) (Hove) Managements Limited ("the Management Company", as termed both above and below) and the lessee. I understand that the leases of the other flats are in the same or substantively the same terms. Relevant provisions are found on page 5 of the Lease, defining the "Consumer system" as the equipment installed in the Flat related to heating and hot water and the "Heating Station" as the boiler house and its equipment.

17. Page 11 includes a covenant by the lessee at clause 4 (19) to pay the Management Company for heating and hot water supplied to the Flat via the Heating Station and the Consumer system. More particularly, the clause reads:

    " Within fourteen days of receiving from the Management Company a statement relating thereto to pay to the Management Company for all heat and domestic hot water supplied to the demised Flat through the consumer system a due proportion (hereinafter called "the Heating Charge") of the amount from time to time paid by or due from the Management Company for heat supplied from the Heating Station to the Building and the certificate of the Management Company as to the amount of the Heating Charge shall be binding and conclusive on the parties hereto"

18. Various covenants are given in clause 5 of the Lease. Those include defining the "Annual Maintenance Cost" and include the costs of the Management Company performing the covenants in clause 8 of the Lease. That clause includes the following:

    (i) That the Management Company will when and as necessary throughout the said term well and substantially maintain repair cleanse repaint redecorate amend and renew all parts of Ashdown (other than the flats in the Building) AND in particular but without derogation from the generality of the foregoing will so maintain repair cleanse repaint amend and renew : -

    .....

    (d) the gas and water pipes conduits ducts sewers drains and electric wires and cables (including television and radio wiring and aerials) and all other the gas water sewage drainage electrical ventilation and heating installations in under or upon any part of Ashdown and provided for the enjoyment and use in common of the Lessees or occupiers of the Building but excluding such installations and services as are comprised in the demised Flat

(iii) That the Management Company will use its best endeavours to ensure the provision of heat and a domestic hot water supply to the consumer system in the demised Flat from the Heating Station after the same shall be in operation

19. The First Schedule to the Lease at paragraph 24 requires the lessee:

"To use the heat supplied to the demised Flat in a normal and reasonable manner"

The parties' cases

20. The essence of the Applicant's written case is explained above. In addition and most pertinently, the Applicant states that the section 20 consultation commenced in May 2020 and has reached stage 2, although only one estimate has been provided to lessees, hence the application, where the Applicant will not proceed to stage 3 unless and until dispensation is granted- this is not therefore the usual dispensation application, which ordinarily reflect urgent work being required or having been required and undertaken already but where the applicant seeks not to be limited to £250 per lease of service charge recovery for the works. The local company that had previously provided maintenance had ceased doing to back in 2017. Brunata, the Danish company that had supplied the current system, only had a UK office in Bristol and that was not prepared to deal with maintenance for the Building. The application stated that the process of getting to the current position had been a long one.

21. The Respondent's position as expressed in her written objection and Skeleton Argument was firstly that the work should not be undertaken at all, including asserting that the Lease provides for apportionment of heating charges and not for the proposed works, that a government paper as to costs effectiveness of such works is awaited and that the cost is unreasonable. That was in part expressed in an application notice document and related. The Respondent suggested that the current, 2007 system was never appropriate, that nevertheless the meters in place did work, that the proposed system was uneconomical and that she was unhappy with paying the standing charge and for the charging system for her limited usage. She suggested that the change may not be deemed costs effective. The Respondent also asserted that the Lease provides for charging for heating and hot water, highlighting clause 4 (19) as quoted above.

22. The bundle also included correspondence from the Applicant to the Lessees about this application, certain emails between the parties during the course of the case which included queries and comments of the Respondent and replies from the Applicant, the stage 1 and 2 consultations as undertaken, documents in respect of meetings and works several years ago. I add that it is unclear if any matters could have been resolved prior to the hearing but I do consider it regrettable

that in response to the Respondent's representative's offer by email to discuss matters, the Applicant firmly closed the door on that by its reply. Ongoing communication could not have harmed.

The hearing

23. Mr Fitzgibbon attended the hearing on behalf of the Applicant. Mr Stephen Taylor and Mrs Barbara Taylor, his mother, attended on behalf of Mrs Barbara Taylor. Mr Fitzgibbon had provided a hearing bundle. Mr Taylor provided a single page Skeleton Argument summarising Mrs Taylor's position. Mr Fitzgibbon did not provide any similar document. No legal authorities were relied upon by either party.

24. Aside from introductory matters, the hearing largely took the form of questions asked by myself of one or other of Mr Fitzgibbon and Mr Taylor, or in many instances of both. Mr Taylor also asked a small number of questions of Mr Fitzgibbon. Both representatives, and Mrs Taylor briefly, made other comments. Those are summarised below. I explained that a written Decision would following within a few days.

25. I explained at the outset of the hearing that the essential question for me to determine was whether the Respondent would be prejudiced by the Applicant being granted dispensation from the requirement to provide more than one estimate at stage 2 of the consultation process, being the application made. I explained that consideration of wider matters did not form part of the determination of this application and that if the Respondent took issue with the consultation process as a whole or with the costs of the major works and the consequent service charges, then those were matters which would need to be the subject of separate applications, which the Tribunal would determine if and when asked to do so.

26. There was firstly, discussion of the original intentions when the flats were built and leases granted as to heating charges. Mr Fitzgibbon expressed the opinion that the information supported there having been a metering system from the outset and that is what was meant by reference to cost being apportioned but further that certainly documentation from back in 1986 referred to such a metering system. Mr Taylor expressed the opinion that was wrong and made reference to an agreement (which was not in the bundle and he indicated he had only recently become aware of) between the developer and Shell- who then initially supplied the gas- back in 1972. Mr Taylor accepted that the lessees had been charged by metering, at least for some years, although he had an issue with the system chosen in 2007. I noted that whatever the merits or otherwise of any concerns, it was beyond the powers of any of us to deal with that.

27. Mr Fitzgibbon added to the Applicant's case in oral evidence that the 2007 system had a transmission process from meters in the flats and the batteries had a ten- year life, which necessarily either had by the present day expired or would expire. He explained that a problem had arisen

because the local contractor who had supported the system pulled out and he reiterated that Brunata could replace the meters but could not provide a maintenance contract. He explained that Brunata would not deal with those matters from their only UK premises in Bristol and did not have a network of sub-contractors, suggesting that was the effect of the limited use of such systems in the UK. Mr Taylor found it surprising that the Bristol operation did not cover the country. Mr Fitzgibbon explained that the Bristol office dealt with local authority and housing association blocks and opined that it was a niche market.

28. The proposed contractor, Data Energy, could, Mr Fitzgibbon stated, supply and fit and then deal with maintenance and billing. He also said that his enquiries had not revealed any other UK company which could provide all of those elements. He indicated that there were European companies supplying suitable metering systems but in essence there was no UK fitting, support and maintenance. He expressed reticence about dealing with a company based elsewhere in Europe rather than a UK- based one. He did accept that other companies could fit the meters and the system.

29. Mr Fitzgibbon could not say what the cost would be of another company supplying and fitting the meters because whist he had a unit price for the meters themselves from Brunata that was without information as to import duty and VAT. Neither did he know the cost of installation by or on behalf of Brunata. He expressed the belief from his enquiries that the cost of supply from Brunata would be very similar to that by Data Energy, which obtained its meters from Europe, although in their case Switzerland. Mr Taylor stated the cost for supply and installation from Data Energy was £70,000- in response to my query that the figure was given in his Skeleton Argument but not elsewhere in the bundle. Mr Fitzgibbon clarified that the cost was £67,000, which he suggested was not a great deal divided between 124 flats and annualised over ten years- the new system is likely to have a ten- year life. He added that the £45,000 cost of the system in 2007 would, allowing for inflation, be about the same.

30. Mr Fitzgibbon explained that there are two problems with the current system, only the first of which had previously been explained such that Mr Taylor was aware of it. That first is that meters no longer transmit usage data and new meters available have a different frequency and cannot be read through the existing transmission system. Meters which cannot transmit the data could be read manually. The second, and more significant issue, is that many of the meters- he suggested approximately one hundred and increasing by two per week on average- no longer produce any readings at all. Fitting new batteries- which could be done- to the old meters would not resolve the problem. Hence, even manual reading will have no effect and so the issue now goes some way beyond issues with transmission of usage data.

31. Mr Taylor expressed some concern that the application presented had referred to transmission problems but not to an inability to obtain

metering of usage at all. Mr Fitzgibbon accepted that the application did not present the correct picture but said the full extent of the problems had become apparent when the heating was switched back on for the winter. Mr Taylor did not challenge that the evidence given was correct. Mr Fitzgibbon also explained that the new government regulations came into effect on 27th November 2020, amending the 2014 regulations to which reference is made in the papers. He asserted that where there is a metering in place, the Applicant is in breach given that it cannot record usage and bill accordingly.

32. I queried what Mr Taylor considered would be added by another estimate being obtained. He accepted on the basis of the further information from Mr Fitzgibbon that the work needed undertaking but said that had not looked into other companies which could potentially undertake the work. Mr Taylor suggested it unreasonable for leaseholders to need to put forward names. He did assert if there were another estimate, an informed decision could be made.

33. Mrs Taylor made the last comment, no-one wishing to add anything else by way of other closing submissions. She asserted that the Applicant had not put enough work into finding appropriate contractors. She was unhappy that in the future further funds would be requested for a further system, suggesting that bulk buying and apportionment between the flats would be better, avoiding paying out for the major works.

Consideration

34. As set out above in the section of this Decision headed "The Law", the question for me to answer is whether I consider that the Respondent will be prejudiced in one of the two ways identified- either paying where that was not appropriate or in paying more than appropriate- if the Applicant is permitted to provide only one estimate at the second stage of the section 20 consultation process.

35. My decision in respect of that question is that the Respondent is not prejudiced and that dispensation should be granted to the relatively limited extent that it has been applied for, for the reasons set out below.

36. I consider that there is ample evidence that work to attend to the system, so that the usage by each flat can be identified and the lessees or other occupiers billed accordingly. The current system does not work properly and that needs to be dealt with, both to ensure compliance with regulations and so issues do not arise between lessees who may perceive that they are being overcharged for their usage of having to pay more because of the usage of others. I am satisfied that the Respondent will not as a consequence of the limited dispensation form consultation sought, be caused to pay for work that is no appropriate.

37. The Applicant has followed the remainder of the consultation process insofar as relevant to date. That has included the lessees having the opportunity to propose alternative contractors identified by them, that

being considered reasonable. The lessees have taken that opportunity and have suggested two other possible contractors. The Applicant has contacted those contractors and has attempted to establish whether they could provide the required service. It is apparent that one could not provide all of the elements of service sought: it seems highly likely that the other could not either, given that it did not respond and so showed no interest in dealing with the Building. The other lessees than the Respondent have not submitted any objection asserting that any more ought to have done in respect of those two contractors.

38. The Applicant has not, I find, fixed on proceeding with one contractor to the exclusion of others. Indeed, Mr Fitzgibbon was very clear that efforts had been made to contact other companies, including the Danish company which had been dealing with the Building previously. Whilst the Applicant did not produce written evidence of such contacts and any responses, and whilst it would have been helpful for it to have done so, I accept that the efforts were made. The Applicant presents as having taken a sensible approach and to having appropriately thought about what is required, acknowledging that the system will have to be updated again in due course and seeking to achieve, until then an effective solution to the requirements for the Building.

39. Most importantly, the Respondent had not proposed any alternative contractors during the consultation process and had not identified any in the course of this application. The Respondent therefore had no evidence that there was an alternative contractor who would be interested in supplying and fitting the meters and in then supplying the gas and maintaining the equipment. Or at least, and more significantly for the reasons below, in performing the first two tasks.

40. In that regard, I adopt some caution and remember that the question is one of qualifying works. Those works are the supply and fit of a new metering system. Ongoing maintenance and arrangements for billing are not major works. Whilst it is perfectly sensible in principle to use the same company for all, it would also be entirely possible to have the meters supplied and fitted- the major works with which I am concerned- and then to address arrangements for the ongoing matters separately.

41. The Applicant has plainly sought to obtain a contractor who will undertake all elements of the major works and ongoing service. The Applicant has, it appears, discounted contractors which might undertake the major works, which are the subject of the application for dispensation sought, but would not be able to provide a service thereafter. It may be that approach has prevented other contractors putting forward prices for the major works, most notably the contractor proposed by a lessee which the Applicant informed would not be proceeded further with because it could not provide an ongoing service.

42. However, that is not one the points made by the Respondent in her case, save for the comments of Mr Taylor in response to my question of him set out at paragraph 32 above. There is no evidence that the other

contractor, or any other suitable contractors who could have been found, would undertake the work to an appropriate standard and, insofar as that is relevant, for a lower price, if the Applicant had directed its sights on the more limited issue relevant to major works and dispensation. If there had been, I would have needed to consider that aspect of potential prejudice even more carefully. It may be, of course, that the Respondent would have wished the cheapest quote to be accepted but it is not apparent what else the Respondent would have said in the event of two quotes being available. It is not clear that such cheapest quote would have been a different company to Data Energy and that, even if the other quote was cheaper, it would necessarily have been appropriate to use that other company.

43. The net effect is that the Respondent has not discharged the evidential burden on her and that no credible case for the Respondent being prejudiced has been advanced.

44. That said, it merits adding that the Applicant would not have been compelled to accept the cheapest quote and that it may well have been reasonable to proceed with Data Energy even in the face of a cheaper quote. It is also worth adding that Data Energy would not have been reliant on profit solely form the supply and fitting of the system but would have anticipated an income stream for several years into the future. Whilst I repeat that ongoing maintenance and billing is separate to the major works and that the contractors from whom quoted were obtained ought not to have been limited by the ability to provide an ongoing service, I consider that the ability to ensure that such service and maintenance will be undertaken by a company who supplies and fits such systems, still more has supplied and fitted the particular one, would reasonably carry weight.

45. The Applicant would have been perfectly entitled to give the ongoing service appropriate weight when choosing between companies which had quoted. It is apparent that it would reasonably have done so and the likelihood is that Data Energy would have been selected in the face of other quotes, even ones cheaper to the extent that seems realistically possible, for that reason. The likely outcome would have been the same.

46. I observe that as the application and consultation relates to the major works and not to the ongoing supply or maintenance contract the dispensation that I consider it appropriate to grant only therefore covers the major works, that is to say the supply and fitting of the new meters and transmission system together with related work. Any matters relevant to entering into a supply or maintenance contract, if a qualifying long-term, will be a separate matter. I do not know whether such an agreement is intended and it is any event perhaps not appropriate for me to make any further comment within this Decision.

47. Accordingly, the application is granted.

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