



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00BG/LDC/2019/0167**

Property : **Canary Riverside Estate**

Applicant : **Alan Coates, Manager**

Representative : **HML Andertons**

Respondents : **Various Leaseholders as identified
in the schedule accompanying the
application**

Representative : **N/A**

Interested Persons : **(1) Mr Sol Unsdorfer
(2) Residents Association of
Canary Riverside
(3) Canary Riverside Estate
Management Limited
(4) Octagon Overseas Limited**

Type of application : **To dispense with the requirement
to consult lessees about major
works/ a long-term agreement**

Tribunal member : **Judge Amran Vance**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of Decision : **31 January 2020**

DECISION

Decision

1. The tribunal grants retrospective dispensation from the whole of the consultation requirements for qualifying works under section 20ZA of the Landlord and Tenant Act 1985 (the “1985 Act”). This dispensation is granted in respect of work carried out in about September 2019 to repair chiller equipment servicing Berkeley Tower and Hanover House at the Canary Riverside Estate (“the Estate”).
2. The applicant must send a copy of this decision to all leaseholders on the Estate and may do so electronically where a leaseholder’s email address is known.

The Application

3. The applicant was the tribunal appointed manager of the Estate up to 30 September 2019. He was replaced, with effect from 1 October 2019, by Mr Sol Unsdorfer.
4. The Estate is a mixed-use, purpose built development comprising 325 flats, a hotel, health club and commercial units. Octagon Overseas Limited (“Octagon”) is the freehold owner of the Estate. Canary Riverside Estate Management Limited (“CREM”) is the leasehold owner of a large part of the Estate, pursuant to six long leases. The respondents are the sub-leasehold owners of the residential flats in the Estate.
5. In this application, which was received on 24 September 2019, Mr Coates seeks 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. He contends that dispensation should be granted in respect of the replacement of one of the three chiller units serving Berkeley Tower and Hanover House that developed a fault around February 2019.
6. The applicant states in his application that it is believed that the previous agents, in conjunction with the landlord, secured a five-year warranty when the chiller units were installed. However, the applicant’s position is that the fault that developed in February 2019 is not covered by that warranty. He also states that the repair to the unit had to be carried out by Trane, the contractor that installed the plant, because the use of an alternative contractor would invalidate the warranty.
7. Mr David Broome, a property manager at HML Andertons (“HML”), who reported to Mr Coates during his term as manager, has provided a witness statement dated 7 November 2019 in which he confirms that the warranty over the chiller equipment is only valid so long as Trane carry out servicing and maintenance over the five years of the warranty.

That warranty, he says, has about two years left to run. Accompanying his witness statement are copies of multiple reports evidencing that Trane carried out servicing and maintenance works to the chillers in 2017, 2018, and 2019.

- 8.** In his statement, Mr Broome states that in February 2019 the heat exchange unit to one of the chillers cracked, damaging two of the compressors. This required both the heat exchange plate and the compressors to be replaced. Trane identified that fine particulate had built up in the heat exchange plate, narrowing the channels, and this caused excessive freezing, resulting in the plate cracking. Such damage, was not, says Mr Broome, covered by the warranty.
- 9.** Trane quoted for the required works on 4 May 2019, in the sum of £34,495.20 plus VAT. A quote was also obtained from G W Air Conditioning Ltd on 27 March 2019, which including mark-up, amounted to £36,622.80 plus VAT. The cost of investigating the fault amounted to £4,745.52 plus VAT.
- 10.** Mr Broome explains that given the need to preserve the warranty, the applicant had no choice but to instruct Trane to carry out the required works and therefore no statutory consultation was carried out.
- 11.** Directions were issued by the tribunal on 4 October 2019, in which the tribunal directed that the application was to be determined on the papers unless a party requested a hearing. No such request was made, and the application has been determined based on the written representations received. The directions of 4 October 2019 also joined the persons named above as interested persons to the application. The applicant was directed to serve a copy of the application, with any accompanying documents, on all leaseholders, who were invited to return a form to the applicant, and to the tribunal, indicating if they consented, or opposed, the application. The directions also provided for the parties and interested persons to provide statements of case in respect of the application.
- 12.** In the event, a total of nine leaseholders returned a reply form to the tribunal, all of whom supported the grant of dispensation. Representations were received from CREM and Octagon who, whilst not opposing the grant of dispensation, query whether the costs of the works can be recovered through the service charge. They suggest that insufficient evidence has been provided as to why the works were not covered by the warranty with Trane, and that if there has been a failure in the maintenance regime, the costs of the works should, arguably, be borne by Trane, and not leaseholders.

The Law

13. The tribunal is being asked to exercise its discretion under section 20ZA of the Act to dispense with the consultation requirements in respect of qualifying works. The tribunal may make that determination if it is satisfied that it is reasonable to dispense with those requirements.
14. The relevant consultation requirements are set out in Part 2 of Schedule 4 of Service Charges (Consultation Requirements) (England) Regulations 2003 (“the Regulations”) a copy of which is annexed to this decision.
15. The procedure has three stages. In outline, these involve, at Stage 1, the landlord providing each lessee with notice of intention to carry out qualifying works and allowing them an opportunity to make observations about the proposals. This is followed by Stage 2 which requires the landlord to provide the lessees with notice of the proposal to enter into an agreement for the works. Details of the estimates obtained from the contractors need to be provided, or made available, and a further period is allowed within which the lessees can make written observations on any of the estimates. Stage 3 (which requires provision of a notice of the reasons for entering into an agreement, a summary of the observations made and the landlord’s response to these) is omitted if the lowest estimate is accepted or the contract is awarded to a person nominated by a tenant.
16. The leading authority in relation to s.20ZA dispensation requests is *Daejan Investments Ltd v Benson* [2013] 1 WLR 854 (“*Benson*”) in which a majority of the Supreme Court set out guidance as to the purpose of the Regulations. The majority opinion was that the purpose is to ensure that lessees are protected from (a) paying for inappropriate works, or (b) paying more than would be appropriate. The Court considered that when considering dispensation requests, the Tribunal should focus on whether the lessees were prejudiced in either respect by the failure of the landlord to comply with the Regulations (relevant prejudice). The factual burden of identifying some relevant prejudice is on the lessees. If a credible case of prejudice is established, then the burden is on the landlord to rebut that case. The decision also establishes that the tribunal has power to grant dispensation on such terms as it sees fit where it is appropriate to do so.

The Tribunal’s Decision and Reasons

17. The approach for a tribunal to adopt when considering a dispensation request was identified in *Benson* as requiring it to focus on the extent, if any, to which the lessees were prejudiced in either paying for inappropriate works or paying more than would be appropriate, because of the failure to comply with the consultation requirements. In his judgment, Lord Neuberger said as follows;

44. 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 the Requirements.

45. Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, 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 – ie as if the Requirements had been complied with.

18. The burden on proving relevant prejudice is on any objecting leaseholder and, in this case, none have objected to the application. None of the respondents, or the interested persons, has suggested, that the works are inappropriate, and none have produced any evidence to suggest that they have been prejudiced by the lack of statutory consultation.

19. Accordingly, I am satisfied that it is reasonable to grant retrospective dispensation from the consultation requirements in respect of these works. Given the lack of any objections, I do not consider it appropriate to impose conditions on this grant of dispensation.

20. As to CREM's concerns concerning whether the costs of the works can be recovered through the service charge, it is aware, this is not a relevant consideration in this application. As was made clear in the tribunal's directions, this application is not concerned with the question of whether costs incurred are payable by leaseholders, including whether they have been reasonably incurred. Leaseholders can pursue a challenge to the payability of the costs incurred through a separate application under section 27A Landlord and Tenant Act 1985 if they so wish.

Amran Vance

Date: 31 January 2020

ANNEX 1- 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 Tribunal 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 for 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 (i.e. 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.

ANNEX 2

APPENDIX OF RELEVANT LEGISLATION

Landlord and Tenant Act 1985

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.

Service Charges (Consultation Requirements) (England) Regulations 2003.

Part 2 - consultation requirements for qualifying works for which public notice is not required

Notice of intention

1. (1) The landlord shall give notice in writing of his intention to carry out qualifying works—
 - (a) to each tenant; and
 - (b) where a recognised tenants' association represents some or all of the tenants, to the association.
- (2) The notice shall—
 - (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
 - (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
 - (c) invite the making, in writing, of observations in relation to the proposed works; and
 - (d) specify—

- (i) the address to which such observations may be sent;
 - (ii) that they must be delivered within the relevant period;
and
 - (iii) the date on which the relevant period ends.
- (3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

- 2.** (1) Where a notice under paragraph 1 specifies a place and hours for inspection—
- (a) the place and hours so specified must be reasonable; and
 - (b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.
- (2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

- 3.** Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates and response to observations

- 4.** (1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.
- (2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a

recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

- (3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—
 - (a) from the person who received the most nominations; or
 - (b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or
 - (c) in any other case, from any nominated person.

- (4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—
 - (a) from at least one person nominated by a tenant; and
 - (b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

- (5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—
 - (a) obtain estimates for the carrying out of the proposed works;
 - (b) supply, free of charge, a statement (“the paragraph (b) statement”) setting out—
 - (i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and
 - (ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

- (c) make all of the estimates available for inspection.
- (6) At least one of the estimates must be that of a person wholly unconnected with the landlord.
- (7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord—
 - (a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
 - (b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
 - (c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;
 - (d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or
 - (e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.
- (8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.
- (9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—
 - (a) each tenant; and
 - (b) the secretary of the recognised tenants' association (if any).
- (10) The landlord shall, by notice in writing to each tenant and the association (if any)—

- (a) specify the place and hours at which the estimates may be inspected;
 - (b) invite the making, in writing, of observations in relation to those estimates;
 - (c) specify—
 - (i) the address to which such observations may be sent;
 - (ii) that they must be delivered within the relevant period; and
 - (iii) the date on which the relevant period ends.
- (11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

5. Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

6. (1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)—
- (a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and
 - (b) there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

- (2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.
- (3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.