



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

- Case References** : **BIR/00GA/LDC/2021/0011
BIR/00GA/LDC/2021/0012**
- Properties** : **(1) 34 Hunderton Road Hereford HR2
7AE
(2) 35 Hunderton Road Hereford HR2
7AE**
- Applicant** : **Connexus Homes Limited**
- Respondents** : **(1) Mrs IM Powell
(2) Miss A Davies**
- Type of Application** : **An application under section 20ZA of the
Landlord and Tenant Act 1985 for
dispensation of the consultation requirements
in respect of qualifying works.**
- Tribunal Members** : **V Ward BSc Hons FRICS – Regional Surveyor
R P Cammidge FRICS**
- Date of Decision** : **3 November 2021**

DECISION

Background

1. By applications received by the Tribunal on 3 June 2021, the Applicant freeholder sought dispensation from some or all or some of the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 (“the Act”).
2. Section 20 of the Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularised, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee has to pay by way of a contribution to “qualifying works” (defined under section 20ZA (2) as works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant in excess of £250.00.

The only issue for the Tribunal to determine under these applications is whether or not it is reasonable to dispense with the statutory consultation requirements.

These applications do not concern the issue of whether any service charge costs will be reasonable or payable in relation to the proposed works.

3. The case management powers provided by Rule 6 (3) (b) of the Tribunal Procedure (First – tier Tribunal) (Property Chamber) Rules 2013 allow the Tribunal to consolidate cases where there are common features. The Tribunal consolidated these applications but gave the parties the opportunity to object to the same.
4. The Applicant is seeking dispensation from the consultation requirements because proposed works to tenants’ flats are to be carried out using financial support from the European Regional Development Fund (ERDF) and is subject to a strict timetable to enable release of such funds. The project includes external wall insulation and roofing works.
5. The Applicant seeks dispensation from the section 20 consultation requirements set out in paragraphs 4, 5 and 6 of Schedule 4 part 2 of the Service Charges (Consultation Requirements) (England) 2003.
6. The Applicant had indicated that they were content with a paper determination. Any Respondent who required an oral hearing, was invited to notify the Tribunal upon making their submissions. None of the parties to this application requested an oral hearing, accordingly the Tribunal determines this matter on the basis of the written submissions of the parties and without an inspection of the Property.

The Submissions of the Parties

The Applicant

7. The Applicant, a social landlord, is the freeholder of the Properties that are the subject of these applications.
8. The Applicant's statement explained that the proposed works are to be carried out using financial support from the ERDF, and completion of works and defrayal of costs are time limited. The external wall insulation and roofing works are required to extend the life of the block and external doors & windows are at the end of their useful life. Roofing works are urgent and including other works requiring scaffolding will help defray the overall cost of works by letting a single contract-for all repair & improvement works at the same time.
9. The Connexus Warmer Homes project will protect the structure of the three storey blocks of Type 1 Cornish Unit flats, in which the subject Properties are located, and enhance energy performance, using Passivhaus Planning Package (PHPP) modelling to inform the detailed design of insulation, roofing and fenestration to the blocks. Connexus has a commitment to ensuring that all properties meet SAP C by 2030 and Net Zero Carbon by 2050. SAP (Standard Assessment Procedure) is the methodology used by the Government to assess and compare the energy and environmental performance of dwellings
10. The Applicant has identified 64 homes for this project, and the procurement of the contractors was conducted over the winter of 2020/2021 with a view to starting on site in August 2021. The proposed works are qualifying works for which consultation under section 20 of the Landlord and Tenant Act 1985 is required with leaseholders under Schedule 4 part 2 Of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("The Regulations"). The Applicant has complied with the requirements of paragraphs 1 to 3 of the Regulations as a Notice of Intention was sent to leaseholders on 11 August 2020 and no observations were then received during the consultation period of 35 days.
11. The Applicant states that they have carried out a full tender process. Eighteen contractors expressed an interest and registered for the project. Only one tender was received, and this has been assessed by Michael Dyson Associates ("MDA"), the Applicant's agent for the scheme and they have produced a tender report indicating that the costs submitted are reasonable. A copy of their report was exhibited.

12. The Applicant is therefore unable to fully comply with the consultation requirements as they are unable to provide 2 estimates. However, due to the nature of the funding arrangement in place, and the availability of match funding in the current financial year, the Applicant must proceed with the works as soon as possible as any significant delay could result in the condition of the roof and extremal walls deteriorating further and such levels of funding might not be available in the future.
13. The Ministry of Housing, Communities and Local Government (“MHCLG”), who manage the funding have advised that they do not believe a new full tender process is likely to change the outcome or costs, but will mean a further delay and carries the risk of the project not being delivered within available resources or timescale. The Applicant therefore seeks dispensation from the consultation requirements imposed by section 20 of the Act.

Costings

14. The tender received from Sustainable Building Solutions (“SBS”) amounted to £8,819,278 for the original programme of 172 properties. This sum significantly exceeded the available budget and the Applicant instructed MDA to enter into negotiations with SBS to reduce the scope of works. It was agreed to limit the property schedule to just the properties where works are urgently required; the roof coverings are in poor condition, windows are near end of their useful life and where a structural engineer’s report recommended installing external wall insulation in order to protect the concrete structure from deterioration due to exposure to the elements.
15. The structural engineers report prepared by Curtins Consulting Ltd was exhibited. The Applicant appointed Curtins to survey several properties, including those that are the subject of this application, and report on their longevity and suitability of the buildings to support external wall insulation. Their report outlined the following recommendations:

In order to improve the thermal performance, appearance and longevity of all the blocks we recommend the following remedial works should be undertaken:

- *Remove the existing roof tiles, inspect the existing roof structure. Supply and fix insulation within the mansard and roof construction. Supply and fix new roof tiles*
- *Supply and fix all lead flashing*
- *Re-point all chimneys*
- *Replace all rainwater goods*
- *Supply and fix external wall insulation to external structure*

- *Subject to budgets, we would also recommend that the windows and doors renewed. If the windows are not changed at the time of applying the external wall insulation, there is a risk of damaging the rendered surface when the windows are changed.*
- *Clean the brickwork below dpc and paint with 2 coats of a bituminous paint*
- *Check compartmentation of the party walls between flats*
- *Check compartmentation within the mansard roof at the party wall line*
- *Unblock all gullies and renew gully grates*

Subject to the above, we consider that the building will be suitable to accept EWI (External Wall Insulation) and provide an extended life of 30 years.

16. Following two rounds of negotiation the overall cost, based on the original tendered sums for each element, with reduced scope of works and property schedule was revised to £2,740,000 including fees, disbursements and VAT. The Applicant indicated that the project encompassed 64 properties however there was also an indication that the scheme had been reduced to 60 properties. As a result of the Tribunal's specific direction, the Applicant confirmed the cost as £45,667 per property. The Applicant states that they are unable to claim ERDF grant funding for leasehold flats, so this is the net amount to be recovered from each leaseholder if the Tribunal agrees to the current dispensation application. The Tribunal has taken this amount as definitive.

The Respondents

17. The Respondent leaseholder of 34 Hunderton Road indicated their support for the dispensation application.
18. Despite numerous invitations, the Respondent leaseholder of 35 Hunderton Road offered no comment on the application.

The Law

15. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularised, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee has to pay by way of a contribution to "qualifying works" (defined under section 20ZA (2) as works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works

which result in a service charge contribution by an individual tenant in excess of £250.00.

16. There are essentially three stages in the consultation procedure, the pre-tender stage; Notice of Intention, the tender stage; Notification of Proposals including estimates and, in some cases, a third stage advising the leaseholders that the contract has been placed and the reasons behind the same.
17. It should also be noted that the dispensation power of the First-tier Tribunal under section 20ZA of the 1985 Act only applies to the statutory consultation requirements and does not confer any power to dispense with any contractual consultation provisions which may be contained in the lease.
18. The Supreme Court's ruling in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 ("*Daejan*"), noted the following:
 - a) Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20ZA (1).
 - b) The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
 - c) Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
 - d) The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' that they would or might have suffered is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult.
 - e) The court considered that 'relevant' prejudice should be given a narrow definition: it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
 - f) Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
 - g) Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
 - h) In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the

dispensation should be granted in the absence of some very good reason.

- i) The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- j) The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord application under section 20ZA (1).

Deliberations

19. The Tribunal notes that contained within the recommendation section of the MDA Tender Report to the Applicant, is the following statement:

Taking into consideration the cost and quality submission received from SBS and also the further cost/work package clarifications and subsequent responses, the most favourable tender received is that from Sustainable Building Services LTD and therefore MDA recommends that Connexus accept their revised tender and proceed into final contract negotiations to allow the Warmer Homes scheme to progress.

20. Whilst from the information supplied, it appears that the works will be professionally managed, as there was only one tender, the MDA Report is obviously no endorsement that the price submitted by SBS is reasonable. However, reasonableness is not a consideration for the Tribunal under this application. The Applicant did however seek tenders from a number of contractors and whilst only one bid was received, contractors able to carry out what are specialised works are likely to be limited. In addition, the Applicant carried out several rounds of negotiation with the proposed contractor which would lead the Tribunal to consider that the procurement process has been diligently carried out.
21. In their statement, the Applicant offers the following:

...where a structural engineer's report recommended installing external wall insulation in order to protect the concrete structure from deterioration due to exposure to the elements.

The Tribunal's interpretation of the Curtins report is that it does not, certainly specifically, say that. In section 1.0 "Introduction" it states, "That this matter is primarily concerned with the structural stability of the buildings and if they are suitable to accept external wall insulation". In section 7 "Recommendations" it refers to a list of remedial works which will "improve the thermal performance appearance and longevity".

22. However, the sole matter for the Tribunal to consider under this application is, as set out in *Daejan*, whether the Respondent leaseholders have suffered prejudice as a result of the full consultation procedures not being carried out. There is no prejudice apparent to the Tribunal nor has any been identified by the Respondents. On the contrary the leaseholder of flat 34, positively supports the application and the leaseholder of 35, has remained silent despite many requests by the Tribunal to respond.
23. The Tribunal's jurisdiction is limited by statute and precedent and cannot take into account the nature of the organisation or its aims or any financial implications of the decision. The Applicant has set out clearly the steps they have followed to try and adhere to the consultation requirements but has failed in obtaining the required number of itemised tender quotations. Having had interest shown from 18 parties, only one completed quotation was received. This clearly demonstrates the intention of the Applicant in endeavouring to comply with the consultation requirements although ultimately this was not successful. No evidence has been put forward as to the reason for the dramatic reduction of interest in the contract.

The Tribunal's Determination

24. The Tribunal therefore grants dispensation from the consultation procedures for the works set out in the Connexus Warmer Homes tender report dated 20 April 2021.
25. Parties should note that this determination relates only to the dispensation sought in the application and does not indicate that the Tribunal agrees to the amounts / liabilities 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

Appeal

26. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

V WARD