



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

Case Reference	: CHI/45UB/LDC/2019/0015
Property	: Various Properties within Adur District
Applicant	: Adur District Council
Representative	: Legal services
Respondent	: One Lessee
Representative	:
Type of Application	: To dispense with the requirement to consult lessees about entering into a Qualifying Long-Term Agreement
Tribunal Member	: Mr D Banfield FRICS
Date of Decision	: 18 April 2019

DECISION

- 1. The Tribunal grants dispensation from all or any of the consultation requirements of S.20 Landlord and Tenant Act 1985 for the purpose of entering into the framework agreement with SEC for the purpose of fire safety works.**
- 2. The Tribunal's dispensation is conditional upon none of the costs of this application being recovered from the Lessees by way of service charges.**
- 3. In granting dispensation the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

Background

4. The Applicant 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.
5. The Applicant explains that it intends to join a framework agreement with SEC (the South-Eastern Consortium) which is a Qualifying Long Term Agreement and which will be used to procure fire safety works to the communal areas of the buildings.
6. The Council issued a Notice of Intention on 25 October 2018 to which five lessees sent written observations, one of which specifically objected to the proposal.
7. Paragraph 1.2(d) of Schedule 2 of the Service Charge (Consultation Requirements) (England) Regulations requires that the Notice of Intention shall *state that the reason why the landlord is not inviting recipients of the notice to nominate persons from whom he should try to obtain an estimate for the relevant matters is that public notice of the relevant matters is to be given.*
8. As the council is proposing to join an existing long-term agreement it is unable to comply with this paragraph and Dispensation is therefore sought.
9. The Tribunal made Directions on 27 February 2019 which required the Applicant to send to the five Lessees who had responded to the Notice of Intention a copy of the application and the Directions together with a form to be returned to the Tribunal indicating whether the application was agreed with, whether a written statement was to be sent to the applicant and whether an oral hearing was required.
10. The Directions indicated that those parties not returning the form would be removed as Respondents to the application and would not be sent a copy of the Tribunal's decision.
11. One Lessee returned the form and remains as a Respondent. The form did not indicate whether the Respondent objected to or agreed with the proposal but he has subsequently made a number of submissions which will be referred to below. No request has been made for an oral hearing and the application is therefore determined on the papers received in accordance with Rule 31 of the Tribunal's procedural rules.
12. The Lessee who returned the form has asked for his name and address to be withheld from public documents and will therefore be referred to in this determination as "the Respondent"
13. The only issue for the Tribunal is whether it is reasonable to dispense with any statutory consultation requirements. **This decision does**

not concern the issue of whether any service charge costs will be reasonable or payable.

The Law

14. The relevant section of the Act reads as follows:

20ZA Consultation requirements:

- a. (1) Where an application is made to a Leasehold Valuation 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.

15. The matter was examined in some detail by the Supreme Court in the case of *Daejan Investments Ltd v Benson*. In summary the Supreme Court noted the following

- b. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
- c. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
- d. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
- e. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
- f. 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's application under section 20ZA (1).
- g. 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 tenants.
- h. 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.
- i. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- j. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Submissions

Respondent

16. In submissions dated 17 March 2019 the Respondent states that his intention is to;

- Remain as a respondent
- To get the council to agree to provide evidence that the price to performance ratio is better using contractors from the SEC framework agreement rather than those outside.
- Obtain documents that he wouldn't otherwise have access to

17. He then refers to the following;

- If evidence can be shown that lower rates can be secured then he supports the application.
- He is concerned that the council will use SEC solely and that the lessees will have no say in asking the council to seek quotes outside of it. In support of this he refers to the council indicating that "the council will invite contractors who are part of the framework to tender and will appoint the successful one"
- An objective study is required
- It is unclear why tendering costs would be lower using the framework.
- The usual 10% administration fee would be excessive for such a large contract.
- With regard to "terms" He suggest that either the council provide objective evidence that the SEC is better value for money before entering into the framework or that such a comparison is made before entering into any agreement with a SEC contractor.

Applicant

18. In the Applicant's response dated 27 March 2019 Ms Adefehinti says that;

- In requiring objective evidence the Respondent misunderstands the process; the only issue being whether statutory consultation may be dispensed with.
- The reason for joining the framework is to gain access to contractors who bid for work which should reduce the cost. Contractors within the framework usually provide services at a reduced level. The Authority is not obliged to source work through the framework.
- The Authority intend to carry out works as recommended in fire risk assessments in compliance with the Regulatory Reform (Fire Safety) Order 2005. There are eight contractors within the framework able to undertake such work

19. Reference is then made to the requirements of Sections 18-30 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003.
20. Details of the “Pond House Decision” are then given by which framework agreements were determined to be QLTAs and needing to satisfy the consultation requirements Sch.2, para 2 (2) (d) of which cannot be complied with as public notice has already been given.
21. Before calling off a contract under the Framework Agreement the authority will need to carry out Schedule 3 consultation and if outside the agreement a Schedule 4 consultation would need to take place.
22. In cases where public notice is required Sch 2 para.1 (2) (d) requires the authority to inform leaseholders that they will not be invited to nominate a contractor.
23. The Tribunal should determine the matter in the light of Daejan v Benson (i.e. what prejudice arises from dispensation and can it be compensated monetarily?)
24. Dispensation is sought because it considers that there is no prejudice to leaseholders because the contract has been subject to public consultation and there will be a further consultation process for each project, additionally the council will not be bound to use the framework agreement to deliver any fire safety works. No material observations as to prejudice have been received.

Determination

25. This is an application to enter into an existing framework agreement to procure “a programme of communal fire safety works which will be carried out at a number of sites over an extended period.”
26. The Tribunal’s dispensation is required as Schedule 2 of The Service Charges (Consultation Requirements (England) Regulations 2003 which require the council to notify lessees of their intention to enter into a Qualifying Long Term Agreement cannot be complied with as the agreement is already in place.
27. Dispensation from the consultation requirements of S.20 of the Act may be given where the Tribunal is satisfied that it is reasonable to dispense with the requirements.
28. From the information provided it appears that contractors have been included on the approved list only following a competitive tender.
29. When works are required further, albeit reduced consultation with the lessees concerned would then take place in accordance with Schedule 3 of the Consultation Regulation.

30. Comments rather than a specific objection has been received from one Lessee.
31. I am satisfied that Schedule 3 gives sufficient rights to the Lessee to be consulted on any works that would be placed on the service charge.
32. There is no obligation under the Consultation requirements to publish a cost benefit analysis and whether consultation takes place or dispensation is given the situation remains unchanged.
33. The Tribunal's task is to determine whether by not being consulted prior to entering into the framework agreement the lessee has suffered the type of prejudice as envisaged in the Daejan case referred to at paragraph 15 above.
34. In contracts such as these which require a public notice the Lessees have no rights to nominate a contractor and as such the rights lost are simply to be consulted.
- 35. On the basis of the evidence and submissions put before me I am satisfied that the potential benefits of entering into the framework agreement for both lessees and the Council outweigh any loss of consultation rights and the Tribunal therefore grants dispensation from all or any of the consultation requirements of S.20 Landlord and Tenant Act 1985 for the purpose of entering into the framework agreement with SEC for the purpose of fire safety works.**
- 36. The Tribunal's dispensation is conditional upon none of the costs of this application being recovered from the Lessees by way of service charges.**
- 37. In granting dispensation the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

D Banfield FRICS
18 April 2019

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. 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.
2. 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.
3. 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 appeal is seeking.