FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LDC/2019/0180**
Properties	:	**1-10 Holst Court, 11-32 Holst Court 1-16 Mead Row, 17-40 Mead Row, 2-48 Oakley Lane (even), 21-71 Oakley Road (odd) and 50-60 Oakley Lane**
Applicant	:	**Mayor and Burgesses of the London Borough of Lambeth**
Representative	:	**Lambeth Legal Services**
Respondents	:	**The long leaseholders at the properties.**
Representative	:	**Ms E Whittock for those tenants who had replied objecting to the landlord's application for dispensation.**
Type of Application	:	**To dispense with the statutory consultation requirements**
Tribunal Members	:	**Judge Pittaway** **Mr Luis Jarero FRICS**
Date of Consideration	:	**18 March 2020**
Date of Decision	:	**23 March 2020**

DECISION

The Tribunal grants the application for retrospective dispensation from further statutory consultation in respect of the subject works (heating and electrical works the majority of which have already been carried out) subject to the applicant paying the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA of the Act.

The costs of the applicant should not be regarded as relevant costs to be taken into account in the service charge payable by the respondents.

This decision does not affect the Tribunal's jurisdiction upon any future application to make a determination under section 27A of the Act in respect of the reasonableness and/or the cost of the work.

The Application

1. The Applicant seeks a determination pursuant to section 20ZA of the Landlord and Tenant Act 1985 ("the **Act**") for retrospective dispensation from further consultation in respect of certain major works, namely heating and electrical works that have already been carried out at the properties.
2. An application was initially made in respect of the properties in Oakley Lane only. However it was pointed out by various leaseholders that the application affected leaseholders at Holst Court and Mead Row.
3. By directions dated 4 December 2020 (the "**further directions**") the tribunal restarted the proceedings, with the further directions replacing the original directions.
4. As a result of those directions the applicant made an amended application for dispensation dated 16 December 2019, accompanied by a document, "Amended Grounds for Seeking Dispensation". This set out the applicant's case in respect of all the properties.
5. The further directions provided that any leaseholder who opposed the application (and had not already submitted a response pursuant to the original directions) should tell the tribunal and send the landlord a statement responding to the application together with any documents they wished to rely on.
6. The further directions provided that the tribunal would decide the matter on the basis of written submissions unless any party requested a hearing. No such request has been made.

The responses

7. The bundle before the tribunal contained copies of replies objecting to the landlord's application for dispensation from full consultation and appointing Elaine Whittock. Ms Whittock had helpfully provided a list of 57 tenants who had replied objecting, which corresponded with copy replies in the bundles before the tribunal; except that her list listed Ms B Hardcastle of 34 Mead Row twice and listed herself for 57 Oakley Lane without a corresponding reply in the bundle. The tribunal noted that there was also one reply in the bundle from an unidentified tenant of 42 Oakley Lane supporting the application for dispensation.

Evidence before the tribunal

8. The tribunal was provided with bundles which included the amended application with its accompanying Amended Grounds for Dispensation, the Respondents' Grounds of Objection for Dispensation prepared by Ms Whittock, a statement by Dr M Molloy and a further Applicant's Reply.

9. The tribunal has had regard to the above and the other information in the bundle relevant to an application under section 20ZA of the Act.

The applicant's case

10. The works the subject of the application are the upgrade of the heating distribution system and installation of heat interface units, radiators and controls within each of the flats at the properties (the "**heating works**") and the replacement of the electrical services together with the rising and lateral mains serving the properties (the "**electrical works"**).

11. The applicant seeks retrospective dispensation from part of the statutory consultation requirements, pursuant to section 20ZA of the Act. In its Amended Grounds for Dispensation it accepts that it did not comply strictly with the consultation procedure required by the Act and the Service Charge (Consultation Requirements) (England) Regulations 2003 (the "**Regulations**")

12. It asserts that in respect of the heating works both the Notice of Intention and the Notice of Proposal were served correctly in accordance with the Act and the Regulations, but it did not comply with the Regulations in relation to the Notice of Intention in that it did not respond to all the observations made by the leaseholders within the prescribed period. It does however assert that it did have regard and provide responses to the respondents so that this failure could not have prejudiced them.

13. The applicant asserts that in respect of the electrical works the Notice of Intention and the Notice of Proposal were served correctly in accordance with the Act and Regulations on the leaseholders of Mead Row and Holst Court, but again it failed to comply with the Regulations in relation to the Notice of Intention in that it did not respond to all the observations made by the leaseholders of Mead Row and Holst Court within the prescribed period. In relation to the properties in Oakey Lane the applicant accepts that it failed to consult the leaseholders. The applicant asserts that the electrical works were necessary as the existing electrical installation on both the lateral mains and communal lighting had reached the end of their economic lifespan.
14. The applicant referred the tribunal to the decision of the Supreme Court in *Daejan Investments Limited v Benson and others* [2013] UKSC 14 ("**Daejan"**). It submits that the leaseholders were not prejudiced in respect of either the heating works or the electrical works as both were appropriate, given the landlord's maintenance obligations in the leaseholders' leases, and that the price of the works represents value for money because they were competitively tendered.
15. In respect of the failure to consult the leaseholders of Oakey Lane in relation to the electrical works the applicant submits that as a consultation had occurred in relation to similar works at Mead Row and Holst Court, resulting in the applicant choosing Niblock Electrical as the contractor representing the best value, the respondents from Oakey Lane are in the same position as if the consultation requirements had been met, and that these repondents have not suffered any prejudice by reason of the applicant's failure to consult them.

The respondents' case

16. In her statement on behalf of the respondents Ms Whittock objected to a dispensation being given on the grounds that
    a. Not all the consultations alleged by the respondent had actually occurred;
    b. That the respondent had not disclosed to the tribunal all the observations and responses that it received;
    c. That the works went beyond the respondent's repairing obligations under the leases;
    d. That the respondents had not managed the works in a reasonable manner;
    e. That the applicant should have applied to the tribunal before the works were commenced;
    f. That the applicant had not referred to the repair works referred to in the option proposals prepared by Frankham Consultancy Group in 2014, which the respondents assert are the most urgent of the works;
    g. That the applicant failed to tender for the most appropriate type of lighting for the properties;
    h. That the subsequent notices served in February 2016 and May 2016 may have been respectively withdrawn and incorrectly headed;

i. That the notices in respect of the electrical works at Oakey Lane served in February 2018 were incorrect or not served;
j. That it is not known whether the new heating and hot water system is the most appropriate and cost effective;
k. That the tender accepted for the heating works was disproportionately low and increased significantly during the course of the heating works, and the work is not yet complete; and
l. That the applicant failed to consult on impact on visual amenity.

17. Ms Whittock also requested that the tribunal
    a. Impose a condition on the dispensation that the applicant pay respondents' reasonable professional costs incurred in with the respondents' application under section 20ZA;
    b. That the tribunal order that the costs incurred by the applicant in making the application should not be passed on to the leaseholders; and
    c. Award damages for the costs of all relevant expert reports paid for by the respondents.
18. The bundles before the tribunal also contained a statement by Dr Mulloy asserting that the applicant had failed to consult in accordance with the requirements of section 20 of the Act, in particular in relation to visual amenity and that the works had caused significant prejudice to the visual amenity of the Wellington Mills estate.

The applicant's reply to the respondents' objections

19. The applicant submitted that its statutory obligation was to have regard to observations made by the tenants or a recognised tenants' association during the relevent statutory periods; and that to "have regard" does not involve an obligation to follow or implement the observations received, referring the tribunal again to the decsion in *Daejan*. It also drew the tribunal's attention to the decision in *Waaler v Hounslow LBC*[2017] 1 WLR 2817 §38-9 as to the need for the landlord to consider the leaseholders' observations but that the final decision rests with the landlord.
20. The applicant submitted that while it did have regard to the respondents' observations (both within and outside the statutory framework) it was not under an obligation to follow or implement these, citing the decision in *Daejan*.
21. The applicant also submitted that the majority of the respondents' submissions and supporting documentary evidence was not relevant to the application for dispensation from the statutory consultation.

Determination and Reasons

22. Section 20ZA(1) of the Act provides:

"*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*."

23. The whole purpose of section 20ZA is to permit a landlord to dispense with the consultation requirements of section 20 of the Act, if the tribunal is satisfied that it is reasonable for them to be dispensed with. Such an application may be made retrospectively as it has been made here. Accordingly, the respondents' objections to the application for dispensation on the grounds that the applicant failed to follow the statutory procedure and that it should have been made before the works commenced do not preclude the tribunal from dispensing from the need to consult. In this case the tribunal is satisfied that the applicant did endeavour to consult and that these objections of the respondents should not preclude dispensation being given.
24. Whether the works have been carried out to a reasonable standard and at a reasonable cost are not matters which fall within the jurisdiction of the tribunal in relation to this present application. This decision does not affect the tribunal's jurisdiction upon any future application to make a determination under section 27A of the Act in respect of the reasonableness and /or cost of the works.
25. The Tribunal has taken account the decision in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 and, in particular
    a. paragraph 44 which states "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, ...the issue on which the LVT should focus when entertaining an application by the 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";*
    b. Paragraph 59 which gives the tribunal the power to impose a condition as to costs; and
    c. Paragraph 67 which provides that the factual burden of identifying some relevant prejudice that the tenants have suffered or might suffer is on the tenants.
26. What the tribunal has to decide is whether by granting the dispensation the tenants are paying for inappropriate works, or paying more than would be appropriate.
27. The respondents have provided no evidence that they considered that there should not be work done to the heating and electrical systems. Ms Whittock refers to the option proposals prepared by Frankham Consultancy Group in 2014, without suggesting that work to the systems was unnecessary. And the complaints about the actual work go to the manner in which it is being carried out. This is particularly

the case with Dr Mulloy's statement. As to the cost of the works it would appear that, in relation to the heating works, the applicant chose the lowest tender, so it would not appear it was looking to the respondents to pay more than would be appropriate. And in choosing Niblock Electrical to undertake the electrical works there is no evidence that this choice resulted in the tenants being likely to pay more than if another contractor had been chosen.

28. There is therefore no evidence before the tribunal that the respondents were prejudiced by the failure of the applicant to comply with the consultation requirements.
29. The tribunal is therefore satisfied that it is reasonable to dispense with all or any of the consultation requirements in relation to the heating works and the electrical works.
30. Ms Whittock has requested that if the tribunal decide to dispense with the consultation requirements it impose a condition on the dispensation that the applicant pay respondents' reasonable professional costs incurred in with the respondents' application under section 20ZA. In light of the decision in *Daejan* the tribunal are prepared to make this a condition of its decision. The respondents should note that these costs should be limited to costs incurred in connection with the Section 20ZA application; they should not go to costs that relate to the reasonableness of the works or their cost, which are not matters which fall within the jurisdiction of the tribunal in relation to this present application.
31. Ms Whittock also requested that the tribunal order that the costs incurred by the applicant should not be passed onto the respondents.
32. Section 20C(1) of the Act provides that

    A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a [First-tier Tribunal] ……. are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application".
33. Given that the application is necessary by reason of the applicant having not complied with the relevant consultation requirements of section 20 of the Act the tribunal considers it just and equitable that the costs incurred by the applicant in connection with the proceedings before the tribunal should not be regarded as relevant costs to be taken into account in the service charge payable by the respondents.

Name: Judge Pittaway Date: 23 March 2020

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 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.