FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/21UG/LDC/2021/0025
Property	:	The Landmark, Bexhill on Sea, East Sussex, TN39
Applicant	:	Bankside Real Estate Limited
Representative	:	Oakfield P. M. Ltd
Respondents	:	The lessees of Flats 4,5,15,22 & 30
Representative	:	
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)	:	D Banfield FRICS
Date of Decision	:	Made on the papers without a hearing (rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11 on 12 April 2021

DECISION

The Tribunal grants dispensation from the remaining consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the works to two lifts as described in the ILECS specification dated 30 March 2020.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.

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BACKGROUND

1. 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.

2. The Applicant explains that the matter is urgent as both lifts are not functioning as fire- fighting lifts. It is said that the Applicant has been made aware that the building has combustible cladding leading to a change in fire procedure and rendering it urgent that the works are undertaken to ensure evacuation in the event of a fire. The Applicant is only able to obtain a quote from one contractor, the current lift maintenance contractor, all other companies having declined to tender.

3. The Tribunal made Directions on 10 March 2021 indicating that it was satisfied that the matter is urgent, it is not practicable for there to be a hearing and it is in the interests of justice to make a decision disposing of the proceedings without a hearing (rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11.

4. The Tribunal required the Applicant to send to the Respondents its Directions together with a copy of the Application and a form to indicate whether they agreed with or objected to the application and if they objected to send their reasons to the Applicant.

5. It was indicated that if the application was agreed to or no response was received the lessees would be removed as Respondents.

6. Replies were received by or on behalf of 30 lessees 5 of whom objected and who will remain as Respondents. Those lessees who agreed with the proposals or did not respond have, in accordance with the above paragraph been removed as Respondents.

7. 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

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

   S.20 ZA Consultation requirements:

   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.

9. 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

i. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

ii. 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.

iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

iv. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.

v. 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).

vi. 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.

vii. 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.

viii. 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.

ix. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

Applicant's case

10. In addition to the circumstances outlined in paragraph 2 above the Applicant said that Statutory consultation had commenced by the service of a Stage 1 Notice and explained that "We have been in the process of arranging for works to be carried out to both passenger lifts to commission(sic) them back into fire fighting lifts. during this process it has become apparent that parts for the control panel in each lift can only be sourced by the current lift maintenance company East Sussex lifts. as such, all lift companies that have been approached have declined tendering for the works, leaving only East Sussex lifts capable of carrying out the required works. it is imperative that we obtain dispensation urgently to void(sic) the consultation process and arrange for the required works to be carried out by East Sussex lifts, as we are unable to obtain tenders from other contractors."

11. A specification was obtained from ILECS (International Lift & Escalator Consultants) dated 30 March 2020 and described as "Modification of Two Existing Lifts" Paragraph 4.1 of the specification states "*This scope of works relates to the modification of the existing passenger lifts as detailed at the noted sites in compliance with the Tender Documentation and Specification. The Works shall include all that is necessary to complete the project and other specified works. The lifts were manufactured by Kleeman and originally installed by Ascent Lift Services in 2009. Following a period of unreliability, the lifts were subject to modernisation in 2019, with the lift controllers, car and landing pushes and signalisation and associated electrical components being replaced in 2019. At the time of this modernisation, the lifts were not reinstated to full firefighting capacity. This specification details the scope of works now required to reinstate firefighting functionality. The works shall include the modification of the existing controller to provide the functional capability necessary to operate the lift under firefighting control. Other works shall include the supply of new and reinstatement of existing equipment required to operate the lift in firefighting mode."*

12. At paragraph 4.5 is a full specification for the works required which in short comprise the replacement, repair, modification and provision of new components including the retention of the existing controller suitably modified to facilitate firefighting operation.

13. In an email dated 3 March 2021 David Pickering of ILECS stated that "*I can advise that I received an email this morning from the third contractor, declining the opportunity to tender for the proposed works on the basis that they were not confident of being able to provide a suitable level of service following any undertaken works to the lifts. This means that all three lift contractors have now declined to tender for similar technical reasons. As I explained during our conversation, the Sivyk*

controller, that was installed by East Sussex Lifts (ESL), while independently manufactured in Spain, is supplied and supported directly and solely through ESL in the UK. Because of this, any third party lift contractor, wishing to maintain, service or modify the controller in any way, would need to deal with ESL directly for any technical support, spares or replacement parts, being directed to do so even if they contact the manufacturer directly. Dealing with competitors is not necessarily unheard of. Otis, Kone, Schindler etc all manufacture their own products, with third party contractors having to deal with them to obtain spares etc. However, in most cases, there is a specific department within these organisations, that is dedicated to the supply of such parts to the open market. In the case of ESL, they are a small lift contractor with exclusive rights to the supply of an independently manufactured product and are not set up to provide technical support to third parties as a separate service. As such, third party maintenance contractors are unlikely to be willing to deal with ESL, fearing a conflict of interest when it comes to the supply of parts for a product, installed and once maintained by ESL. At this stage, I believe it is likely that any other contractor we approach, will feel equally uneasy about dealing with this equipment. And while we could continue to approach different contractors until we found one willing to work with ESL, there is no guarantee that they will actually be able to complete the require tasks successfully. I am therefore now of the belief, that the only contractor, in a position to provide the necessary technical elements required to undertake the works, and with the required support from the manufacturer, is ESL."

14. Copies of emails from contractors declining to tender were provided.

Respondent's objections

15. Ms Stubbs of Flat 4 refers to whether the defects to the building will be covered by an ongoing insurance claim and to affordability.

16. Mrs Stevens of Flat 5 objected but did not give her reasons for doing so.

17. Ms Lane of Flat 15 commented on the specification used for the tender pointing out that the lifts have never been firefighting lifts and could not therefore be "re-instated" as such. By retaining the existing controller, the scope of those able to carry out such work is reduced and alternative contractors or solutions should be investigated. Two of the three companies from whom tenders were sought were fairly small and may have not had the specialist knowledge required. Re-tendering to a larger pool of contractors should be carried out.

18. Additional objections were made in respect of the lack of competitive process when only able to deal with ESL and the need to seek assurances that their quotation provides value for money. It was also pointed out that whilst the Freeholder has known since September 2000 that works were required they have never been classified as urgent. A heat detection system has been installed and 30 residents trained in Evacuation Management.

19. No evidence has been provided that the Fire and Rescue service have requested firefighting lifts and works could be covered by an ongoing insurance claim.

20. Mr Parmley of Flat 22 objects on the grounds of affordability and the need to await the outcome of the insurance claim.

21. Mr and Mrs Cross of Flat 30 object on the following grounds;

- More companies, including ESL, the existing maintenance contractors should have been asked to tender. ESL now know that they are in an uncompetitive position and are less likely to provide value for money. Further companies should be approached willing to work on the Sivyk controller.
- The lifts have not been certified as Fire Fighting Lifts and no agency is asking for the works to be carried out urgently. Oakfield were informed in December 2019 that they were not compliant, the scope of works was prepared in March 2020 with a Stage 1 Notice only issued on 4 November and tenders sent in February 2021. S.20 has not been complied with and should start again.
- A fire alarm has now been installed, Fire & Rescue are aware of the situation and are not actively pursuing the work.
- The insurance claim may cover the work involved and render the process unnecessary.
- It is accepted that the work needs to be done but it should have been done by the original contractor and is not urgent.

Applicant's responses

22. The Applicant has responded to each objector and summarised as;

- Whilst a claim against the building warranty has been made the process is very slow due to the insurer being in administration. If successful leaseholders can be reimbursed at a later date.

- Whilst it is acknowledged that lessees may be financially stretched, the Freeholder's responsibilities cannot be ignored.

- The statutory consultation procedure requires a minimum of two tenders to be obtained, three lift companies were invited to tender for this work but did not return a tender, whilst other companies may be approached the outcome is likely to be the same. All

leaseholders were served with a Notice of Intention and would have had sufficient opportunity to nominate suitable contractors. Where no nominations are received, we and the lift consultant, ILECS, selected companies that we considered to be suitable to tender. In addition, we would also expect that if ILECS are instructed to carry out a further tendering process to approach additional companies, we would incur more professional fees from them.

- On the 9th January 2017, ILECS undertook a survey of both passenger lifts. Their report was submitted to Oakfield on the 31st January 2017. ILECS have confirmed to us that at the time of their visit in January 2017 the lifts were functioning as fire-fighting. They stated the lifts featured a firefighting control system, which was found to be functioning when checked, however the lifts were not originally signed off to this standard. We disagree that the contractors were misled in any way as they would have received a detailed specification from ILECS setting out the requirements for the lift and full description of work.

- It is possible that the existing controller can be changed which would remove the issue of other companies being unwilling to work on it, however we would consider that any expense associated with this could be deemed unnecessary and unfair for leaseholders. As you will see from our application, we have already approached three lift companies to tender for this work and whilst we accept that there are other companies that could be approached, it is our view that they will likely have the same or similar response from what we have already received from the existing three.

- In the case of the three companies already approached, it is not that they are incapable of doing the work or that they do not have the capacity and expertise, it is that they have taken the commercial view that they do not wish to deal with a third party company for obtaining parts.

- We do not feel that the process has been compromised. East Sussex Lifts have been approached to quote for the works required, and we are expecting that to be received shortly. Neither Oakfield nor ILECS have indicated to ESL that they are the only contractor tendering, so this should not have an impact on their quotation.

- In extensive communications with East Sussex Fire and Rescue service about the lifts, and they have advised that they need to be modified so that they are compliant as Fire-Fighting lifts. The primary reason for requesting dispensation is the fact we have not been able to obtain tenders from competitor companies.

- ESL were not originally invited to tender for this work because the general consensus amongst leaseholders was that they were

unsatisfied with the service provided by them during the previous project.

- Throughout much of 2020 we were in extensive discussions with the Tenants Association about the work required to the passenger lifts. There were a significant amount of queries that needed to be addressed, as well as ascertaining the full extent of work required, why they were required and who should be responsible for the costs. In essence there were many items to be considered fully before plans could be put into action, and the added complications of the pandemic undoubtedly caused numerous delays along the way which one would naturally expect. Legal advice was taken on the subject during the summer of 2020 which was required to assist in planning the appropriate route for us to go down. We were faced with the façade report at the end of 2020, and the associated work involved in addressing the primary concern of the dangerous cladding took precedence over many other matters.

Determination

23. 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 those requirements. Guidance on how such power may be exercised is provided by the leading case of Daejan v Benson referred to above.

24. Objections have been received from several lessees with the common ground of affordability and a wish to await the outcome of the insurance claim. Questions over the appropriateness of the specification, requiring the modification rather than the renewal of the controller, which it is alleged reduced the pool of contractors able to undertake the work. It is also said that the work is not urgent as evidenced by the slow pace of action since the Freeholder became aware of the problem.

25. Whilst the need to complete the work without delay has been referred to the Applicant has indicated that their main reason for seeking dispensation is their inability to obtain two quotations due to the unwillingness of contractors to deal with a competitor in sourcing parts.

26. Whilst urgency is cited as one of the reasons for the application the existence of such urgency is not a factor in whether consent will be granted. In determining an application for dispensation the only issues for the Tribunal is to decide whether the landlord's actions would have been different if consultation with the lessees had been carried out. I do not therefore need to consider the somewhat surprising lack of any evidence from the Fire and Rescue Service as to urgency.

27. Whilst affordability is clearly an issue of importance to lessees I am not persuaded that the Applicant would have modified its proposals following consultation.

28. The Applicant has explained that the outcome of the insurance claim is uncertain and, if successful, money received can be credited back to the lessees when received. As such I am not satisfied that consultation would have changed this decision.

29. Turning now to the remaining issue of being unable to provide two quotations. I accept that, given the existing specification, which requires the modification rather than replacement of the controller, that approaching further companies for quotations is unlikely to meet with success given the only route to obtaining parts being through ESL, a competitor.

30. The only question remaining is therefore whether consultation would have resulted in a change of specification to replace rather than modify the existing controller thereby removing the need to liaise with ESL. The Applicant is concerned that such a cost could be deemed to be unnecessary and unfair to lessees. Given this belief I do not consider that anything that lessees could have provided by way of response to consultation would have altered the Applicant's position.

31. This application is solely to determine whether dispensation from consultation can be given. It does not concern whether any quotation from ESL, once received, is reasonable or indeed payable.

32. On the evidence before me I am not persuaded that the Lessees have been prejudiced by the lack of consultation and as such am prepared to grant the dispensation sought.

33. In view of the above **the Tribunal grants dispensation from the remaining consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the works to two lifts as described in the ILECS specification dated 30 March 2020.**

34. **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

D Banfield FRICS
12 April 2021

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 by email to rpsouthern@justice.gov.uk 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.