



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

Case reference : **BIR/00CN/LDC/2021/0023**

Property : **Midland Court, 39 Cox Street, St Pauls
Square, Birmingham, B3 1RW**

Applicant : **Midland Heart Ltd**

Representative : **Jacqueline Scott – Leasehold Property
Officer, Leasehold Team**

Respondents : **The long leaseholders of Midland Court**

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 member : **V Ward BSc Hons FRICS
Judge David R Salter**

Date of Decision : **5 January 2022**

DECISION

DECISION

The requested dispensation is granted.

Background

- 1) The Applicant urgently seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 from all/some of the consultation requirements imposed on the landlord by section 20 of the Landlord and Tenant Act 1985 ('the 1985 Act').
- 1) The justification for the application is as follows. The Property, known as Midland Court, is arranged over 6 storeys and is currently without the use of a working lift which is a significant inconvenience to the occupants. The Applicant has considered a repair of the existing lift. However, it is of the opinion that it would be more prudent to replace the lift in its entirety. The Applicant seeks dispensation from the consultation procedures to enable the contract for the works to be awarded as soon as the tenders have been assessed.
- 2) By Directions dated 26 November 2021, the Applicant was instructed to send to the Tribunal and the Respondent leaseholders, the following documents in the form of a paginated indexed bundle by 3 December 2021:
 - a) A copy of the application form and accompanying documents (except the lease).
 - b) A copy of the Directions dated 26 November 2021.
 - c) A statement explaining the purpose of the application and the reason why dispensation is sought.
 - d) Copies of any specialist reports obtained in respect of the proposed works together with any quotes received and any other appropriate material.
- 3) The Directions of 26 November 2021 also invited any Respondent who wished to object to the application to submit a statement to the Tribunal with one copy to the Applicant by 17 December 2021, clearly stating the reason and justification for the objection in the form of a paginated indexed document.
- 4) Within their application, the Applicant had indicated that they were content with a paper determination. If any Respondent required an oral hearing, the Directions required such request to be sent to the Tribunal by 17 December

2021. No request has been received. The Tribunal has reviewed the submissions made and considers that an inspection of the property is not required. Accordingly, the Tribunal determines this matter on the basis of the written submissions of the parties without an inspection of the Property.

The Submissions of the Parties

- 5) The Applicant's statement explained that the existing lift at Midland Court has broken down and is not operational. Midland Court is six storeys high and the lack of an operational lift has caused significant inconvenience for the residents of the 28 apartments. There are no residential properties on the ground floor and so residents are made to use the stairs to access their apartments which is beyond "most people's level of comfort", especially when residents are moving in or out of the building or bringing in shopping.
- 6) It is estimated it will take at least 30 weeks to complete the installation of a new lift once a contract has been awarded. The Applicant is seeking dispensation to allow the award of the contract as soon as the tenders have been assessed rather than waiting for the full consultation period to end. It states that it still intends to consult with leaseholders regarding the tenders and estimates, but without following the formal process. It has served Notices of Intention, dated 11 October 2021, on the Respondent leaseholders.
- 7) The Applicant appointed TUV SUD Dunbar Boardman (an independent lift consultancy) to prepare a specification and tender documentation for the complete replacement of the existing hydraulic passenger lift installed at the Property to include all associated building and electrical works. Although not a regulatory requirement for a building of this height, the Applicant based upon the findings of its own fire risk assessment requested that optional costs also be obtained for upgrading the lift to a firefighting and evacuation control lift.
- 8) Five companies were invited to tender by the Applicant. At the request of one of the residents at the Property, D & C Lifts were also invited to tender. However, it declined on the basis that it only undertakes lift installation works in London and would be unable to meet the maintenance requirements during the warranty period due to its lack of coverage in the Midlands area.
- 9) Four tenders were received which can be summarised as follows:

Morris Vermaport Ltd	£123,555.00
Rubax Lifts Limited	£120,730.00
Ansa Elevators Ltd	£130,070.00

Kone plc

£130,500.00

The tenders exclude VAT but are inclusive of a £5,000 provisional sum for contingencies.

- 10) The Rubax Lifts Limited offer at £120,730.00 was found to be the most competitive and is confirmed to be in full compliance with the specification and tender documentation issued. Accordingly, it is the recommendation of TUV SUD Dunbar Boardman that Rubax Lifts Limited be awarded the contract to carry out the lift replacement works at Midland Court. The tender process revealed that a fully compliant firefighting lift cannot be accommodated within the confines of the existing lift shaft.
- 11) No submissions were made by any of the Respondent leaseholders.

The Lease

- 12) The Application before the Tribunal relates only to the requested dispensation from the statutory consultation regime in the 1985 Act as interpreted by the courts (see below, paragraphs 13-16).

The Law

- 13) Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the consultation procedures landlords must follow which are particularised, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a leaseholder 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 leaseholder in excess of £250.00.
- 14) Essentially, there are 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.
- 15) In *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 (“*Daejan*”), the Supreme Court 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 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 landlord's 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's application under section 20ZA (1).

- 16) For the sake of completeness, it may be added that the Tribunal's dispensatory power under section 20ZA of the Act only applies to the aforesaid statutory and regulatory consultation requirements in the Act and does not confer on the Tribunal any power to dispense with contractual consultation provisions that may be contained in the pertinent lease(s).

The Tribunal's Determination

- 17) It is clear to the Tribunal that a fully functioning lift is required in a six-storey building and that the works are urgently required.
- 18) The Applicant, by way of the Notices of Intention, has advised the Respondents of its aim to replace the lift and has responded to the observation from one leaseholder relating to the nomination of a contractor.
- 19) The Applicant has obtained quotations from four companies and from the information provided appears to have the intention of proceeding with the contractor who tendered the lowest bid.
- 20) The Tribunal cannot identify any prejudice (as defined by *Daejan*) that the Respondents may suffer as a result of the failure to consult, nor have any Respondents made any submissions to that effect. Accordingly, the Tribunal determines that, on the evidence provided, it is reasonable to dispense with the further consultation requirements of section 20 of the 1985 Act. The requested dispensation is, therefore, granted.
- 21) Parties should note that this determination does not prevent any later challenge by any of the Respondent leaseholders under sections 19 and 27(A) of the 1985 Act on the grounds that the costs of the works when incurred had not been reasonably incurred or that the works had not been carried out to a reasonable standard.

Appeal

- 22) 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