FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CS/LDC/2022/0026**
Property	**:**	**Queensridge Court 82 Queensway Oldbury Birmingham B68 0LE**
Applicant	**:**	**Housing 21**
Respondent	**:**	**The Leaseholders of Block A (Garden View) and Block B (Hillside)**
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** **J Rossiter MBA MRICS – Valuer Member**
Date of Decision	**:**	**2 January 2022**

DECISION

Background

1. The Applicant freeholder sought dispensation from all or some of the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 ("the Act").

2. The justification for the application provided by the Applicant was that they wished to carry out the replacement of the heating and hot water system at the Property. The Landlord stated that the heating system had failed resulting in the need for an urgent replacement

3. By Directions dated 15 September 2022, the Applicant was instructed within 7 days to:

    a) send to each of the Respondent leaseholders either by email, hand delivery or first class post, copies of the application form and those Directions; and
    b) display a copy of the application form and Directions in a prominent position in the common parts of the Property; and shall immediately confirm to the Tribunal in writing that this has been done.

4. Those Tenants who opposed the application were instructed within 21 days from the date of the Directions to:

    a) Complete the attached Reply Form and send it to the Tribunal; and
    b) Send to the Landlord a statement in response to the application with a copy of the Reply Form. They should send with their statement copies of any documents upon which they wish to rely.
    c) If a Respondent required an oral hearing, they were to indicate accordingly on the reply form.

5. The Landlord was directed to prepare the bundle of documents which should be in a file, with an index and numbered pages. The bundle should contain all of the documents on which the Landlord relies, and copies of any replies from the Respondents. By 28 days from the date of the Directions the Landlord was to send one copy of the bundle to the Tribunal and one copy to each Tenant who opposed the application.

6. As the Applicant did not comply with the instruction in 3. above to provide a copy of the application form and Directions to the Respondents until 12 October 2022, the time limit for the Respondents to object was extended to 4 November 2022.

The Submissions of the Parties

The Applicant

4. The Applicant's submissions stated that the existing system served 60 flats for communal heating/hot water with a constant temperature circuit supplying individual MHS Heat Interface Units (HIU) providing heating and hot water independently to each the flats. Over the last 5 years there have been numerous visits and issues with a lack of hot water and general overall performance of the boiler plant. The Applicant believed this to be part of an issue related to the pipe size feeding the HIU being too small to supply for the demand for water at any one time.

5. Continuing, the Applicant said the mechanical installation of the boilers in the plant room had been under considerable strain due to cycling of the boilers. This led to catastrophic failure in January 2022, and as a result the Applicant had to install temporary boilers in the meantime. The statement indicated that the total cost was £143,578.87 including VAT.

6. From the information provided to the Tribunal, the works would have been completed by the time of the application which was therefore of a retrospective nature.

The Respondents

7. The Respondent leaseholders of apartment numbers 61, 65, 68 and 74, returned the reply form which indicated that they objected to the application, but they did not provide statements. As a result of this, the Tribunal wrote to each of these Respondents inviting them to provide a copy of their objection. Only one response was received from the representative of Mr A Potts (No 68) who stated that he did not object to the application.

Hearing and Inspection

8. As there were no requests for an oral hearing and the Tribunal does not consider there is any necessity for the same, the Tribunal has determined this matter on the basis of the written submissions of the parties and without an inspection of the Property.

The Lease

9. The application before the Tribunal relates only to the requested dispensation from the statutory consultation regime in the Act as interpreted by the courts (see below).

The Law

10. Section 20 of the 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.

11. 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).

12. 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

13. It is clear to the Tribunal from the submissions made that the works were urgently required to maintain satisfactory living conditions for the Respondent residents.

14. The Tribunal cannot identify any prejudice (as defined by *Daejan)* that the Respondents may suffer as a result of the failure to consult, nor has any Respondent made any submissions to that effect.

15. Accordingly, the Tribunal determines that, on the evidence provided, it is reasonable to dispense with the consultation requirements of section 20 of the Act. The requested dispensation is, therefore, granted.

16. 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 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

17. 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