FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/29UC/LDC/2022/0063
Property	:	Various properties at Fyndon House, Mannock House and 17-52 Starle Close
Applicant	:	Canterbury City Council
Representative	:	Peter Kee In house solicitor Shomik Datta of Counsel
Respondents	:	The Leaseholders named on the schedule to the Application
Participating Respondents	:	Hilary Pryer and Taylor Pryer-Freeman (6 Mannock House) Margaret and Michael Bee (13 Mannock House)
Representative	:	
Type of Application	:	To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985 ("1985 Act")
Tribunal Member(s)	:	Judge Tildesley OBE Ms A Clist MRICS Ms T Wong
Date and Venue of Hearing	:	Havant Justice Centre 19 January 2023
Date of Decision	:	8 February 2023

DECISION

The Application

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. The application was originally received on 24 June 2022.

2. The Application related to six blocks of residential housing known as Fyndon House, Mannock House and as 17-34, 35-40, 41-46 and 47-52 Starle Close which were built in the late 1960's and in 1972, and are of brick construction with flat roofs. The flats within the blocks are let on mixed tenure. The Application relates to the 20 dwellings now let on long leases.

3. The qualifying works for which retrospective dispensation is sought were the erection of scaffolding, asbestos testing and removal, replacement of the flat roofs and ancillary works of repair. The works were completed in around October 2020.

4. These works were carried out under a qualifying long term agreement ("QLTA") which was entered into following statutory consultation, and publication of an Official Journal of the European Union ("OJEU") Notice by East Kent Housing (("EKH") on behalf of the Applicant and three other local authorities (Thanet District Council, Folkestone & Hythe District Council and Dover City Council).

5. Notice of intention to enter a QLTA under section 20 Landlord and Tenant Act 1985 ("LTA 1985") and paragraph 1 of Schedule 2 of The Service Charge (Consultation Requirements) (England) Regulations 2003 ("the Regulations*') was given to all leaseholders by letter of 8 February 2019. The description of the proposed contract referred to the installation of new flat and pitched roof coverings. The reason for entering into the proposed QLTA was explained to be as "the existing roof coverings have reached the end of their life expectancy". The OJEU Notice (reference 2019/S 084-198500) was published on 30 April 2019 12 tenders were received in relation to Lot 2 relating to the Applicant. From these Premier Roofing & Construction Limited ("PRC") was selected following analysis of the tenders.

6. On 11 October 2019 notice of the proposed QLTA was given to all leaseholders in accordance with paragraph 5 of Schedule 2 of the Regulations. The proposed QLTA together with the applicable tender rates for the relevant works were made available for inspection.

7. Following the above process, the Applicant entered into a QLTA for replacement roofing works with PRC on 27 November 2019.

8. The Applicant gave notice of its intention to carry out the qualifying works under section 20 of the 1985 Act and paragraph 1 of Schedule 3 of the Service Charges (Consultation etc) (England) Regulations 2003 ("2003 Regulations") to all leaseholders by letter of 3 March 2020.

9. That notice described the proposed works as:

> "Installation of new flat roof coverings, erection of scaffolding, carrying out asbestos testing/removal and undertaking external repair works in association with the roof works"

10. The reason given for carrying out the Works was

> "...it is necessary to carry out the proposed works because the existing roof covering has reached the end of its life expectancy. If left the structural integrity of the building could be affected and this requires an investment in repairs".

11. An estimate of the expenditure applicable to each individual block was provided, and observations invited by 3 April 2020 No observations were received in response to this notice, accordingly no response was required under paragraph 4 of Schedule 3 to the Regulations.

12. The Applicant reviewed the process and identified the following potential breaches of the consultation requirements in respect of the major works:

- The period provided for observations upon the notice of intention was one day less than the required 30 days under paragraph 2(e) of Schedule 3 the Regulations.

- The actual costs incurred for the Works significantly exceeded the estimate provided. The notice of intention failed to include an adequate estimate of expenditure likely to be incurred in connection with the Works under Regulation 2(c) of Schedule 3 of the 2003 Regulations.

13. On 25 November 2022 the Tribunal directed the Applicant to serve the application and directions on the Respondents.

14. On 1 December 2022 the Applicant confirmed that it had posted the documents to each Respondent on 29 November 2022, and emailed on 1 December 2022 the documents to each Respondent for whom the Applicant had a confirmed valid email address.

15. The Tribunal required the Respondents to return a pro-forma to the Tribunal and to the Applicant by 16 December 2023 indicating whether they agreed or disagreed with the Application.

16. Of the 20 leaseholders, the Tribunal received the following responses:

17. **Mannock House**: Eight flats (of 12 in the block) were leasehold. Objections were received from the leaseholders of No.6 (both from Ms Pryer and also from Mr Pryer-Freeman as personal representatives for their late father and from the leaseholders of No.13 (Mr and Mrs Bee).

No other leaseholder objected to the application. The leaseholder of No.9 was the Applicant, which consents to the Application. The leaseholders of No.17 (Mr and Mrs Hirons) have returned the reply form to state they "agree".

18. **Fyndon House**: Six flats (of 12 in the block) were leasehold. No leaseholder has objected. The leaseholders of the six flats have returned the reply form, stating that they "agree with the application" with no further comment.

19. **17-34 Starle Close**: One flat (of 18 in the block) was leasehold. The leaseholders have not returned their reply form to register any objection.

20. **35-40 Starle Close**: Two flats of the six in the block were leasehold. The leaseholder of No.35, Mrs Evans, has returned the reply form to state she "agrees". The other has not returned their form to register any objection.

21. **41-46 Starle Close**: One flat of six in the block was leasehold. The leaseholder has not returned the reply form to register any objection.

22. **47-52 Starle Close**: Two flats of six in the block were leasehold. The leaseholder of No.47, Mr Briggs, has completed the reply form to state he "agrees". The other has not returned the form to register any objection.

23. Mr and Mrs Bee had indicated on their response that they were content for the matter to be dealt with on the papers without a hearing. Mr Taylor Pryer-Freeman and Ms Hilary Pryer requested a hearing

24. On the 21 December 2022 the Tribunal issued further directions listing a hearing for 19 January 2023 at Havant Justice Centre to hear the objections.

25. On 18 January 2023 Mr Pryer-Freeman emailed the Tribunal stating that Ms Pryer and him were no longer able to attend (in person or virtually) on 19 January 2023. According to Mr Pryer-Freeman they mixed up the dates and were no longer in the country. Mr Pryer-Freeman apologised to the Tribunal. They did not request an adjournment of the hearing.

26. On 19 January 2023 Mr Shomik Datta of Counsel appeared for the Applicant. Mr Phillips of Canterbury City Council attended as an observer. Mr Datta supplied the Tribunal with a skeleton argument.

27. The Tribunal decided to proceed with the hearing. All leaseholders had received a copy of the application and had been given an opportunity to participate in the proceedings. The Tribunal had notified the Respondents who had objected to the application of the date and place of hearing. The Tribunal had informed those leaseholders who had not

responded or had agreed to the Application they would no longer be regarded as Respondents. The Tribunal, however, emphasises that the decision is binding on all leaseholders of the 20 flats who were named in the Application.

Consideration

28. The 1985 Act provides leaseholders with safeguards in respect of the recovery of the landlord's costs in connection with qualifying works. Section 19 ensures that the landlord can only recover those costs that are reasonably incurred on works that are carried out to a reasonable standard. Section 20 requires the landlord to consult with leaseholders in a prescribed manner about the qualifying works. If the landlord fails to do this, a leaseholder's contribution is limited to £250, unless the Tribunal dispenses with the requirement to consult.

29. In this case the Tribunal's decision is confined to the dispensation from the consultation requirements in respect of the works under section 20ZA of the 1985 Act. The Tribunal is not making a determination on whether the costs of those works are reasonable or payable. If a leaseholder wishes to challenge the reasonableness of those costs, then a separate application under section 27A of the Landlord and Tenant Act 1985 would have to be made.

30. Section 20ZA does not elaborate on the circumstances in which it might be reasonable to dispense with the consultation requirements. On the face of the wording, the Tribunal is given a broad discretion on whether to grant or refuse dispensation. The discretion, however, must be exercised in the context of the legal safeguards given to the Applicant under sections 19 and 20 of the 1985 Act. This was the conclusion of the Supreme Court in *Daejan Investments Ltd v Benson and Others* [2013] UKSC 14 & 54 which decided that the Tribunal should focus on the issue of prejudice to the tenant in respect of the statutory safeguards.

31. Lord Neuberger in *Daejan* said at paragraph 44

> "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, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s 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".

32. Thus, the correct approach to an application for dispensation is for the Tribunal to decide whether and if so to what extent the leaseholders would suffer relevant prejudice if unconditional dispensation was granted. The factual burden is on the leaseholders to identify any relevant prejudice which they claim they might have suffered. If the leaseholders show a creditable case for prejudice, the Tribunal should look to the landlord to rebut it, failing which it should, in the absence

of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the leaseholders fully for that prejudice.

33. This case is concerned with the dispensation of the consultation requirements for qualifying works under a QLTA. Where those circumstances prevail the consultation requirements are set out in schedule 3 of the "2003 Regulations".

34. This case involved two separate consultation exercises. The first which took place during February and October 2019 concerned the contract, a QLTA, with the selected contractor for the roof works. The Applicant joined forces with three other Local Authorities to enhance its bargaining power and to encourage a larger pool of potential contractors. The consultation was carried out in accordance with schedule 2 of the 2003 Regulations. The contract with the selected contractor, Premier Roof and Construction Limited, was entered into on 27 November 2019. The Applicant is not seeking dispensation from the consultation requirements in respect of this QLTA.

35. Following the appointment of a contractor under a QLTA the Applicant was required to embark upon a separate consultation exercise with the leaseholders for the proposed works to the roof. The requirements for this consultation are set out in schedule 3 and are not as onerous and detailed as the consultation requirements for qualifying works where there is no QLTA. The reason for the abridged nature of the requirements under schedule 3 is because there has been a separate consultation exercise to appoint the contractor under a QLTA.

36. Schedule 3 requires the following steps to be taken:

    a) A notice of intention to carry out the relevant works must be served on each tenant and a recognised tenants association. The notice must describe in general terms the works proposed to be carried out and give the reasons why the landlord considers it necessary to carry out the works. The notice must contain a statement of the total amount of expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works. The notice must invite the making in writing of observations in relation to the proposed works or the landlord's estimated expenditure within the relevant period which is defined as the period of 30 days beginning with the date of the Notice.

    b) The landlord has a duty to have regard to the observations made by any tenant or recognised tenants association and to respond to those observations within 21 days of receipt.

37. The Applicant sent Notices of Intention dated 3 March 2020 to each of the 20 leaseholders. The Notices were in the same format for each leaseholder of the six blocks of flats. They contained the same

description of the works proposed and gave the same reason for carrying out the works. The Notices for each block differed in the estimated costs of the proposed works and the respective contribution of each leaseholder in his/her respective block to the costs of the proposed works.

38. The estimate of the cost of the works for each block given in the respective notices was as follows: £54,000 Fyndon House; £52,080 Mannock House; £71,200 17-34 Starle Close; £29,750 35-40 Starle Close; £29,750 41 -46 Starle Close; and £29,750 47-52 Starle Close.

39. The Applicant received no observations from the leaseholders in the various blocks to the Notice of Intention. The Applicant completed the works around October 2020.

40. The Applicant accepts that there were two breaches of the consultation requirements. The first concerns the 30 day notice period allowed for making observations. The Applicant states that the Notice was sent to each leaseholder by first class post on 3 March 2020, and that the leaseholders would not have received the notice until 5 March 2020. According to the Applicant, this would not have given the leaseholders the full period of 30 days for making observations as the Notice required them to reply by 3 April 2020. The Applicant referred to the decision of the Upper Tribunal in *Trafford HT v Rubenstein* [2013] UKUT581 (LC).

41. In view of the Applicant's admission the Tribunal is satisfied that only 29 days were given for the making of observations which was one day short of the requirement of 30 days.

42. The second breach of the consultation requirements concerned the estimate of the costs of the works given in the respective notices. In respect of Mannock House the estimate of £52,080 was significantly below the actual costs of the works which were £182,102.96. The Tribunal was not provided with the actual costs for the other five blocks. The Tribunal assumes that this discrepancy between the estimate and the actual costs was repeated in the Notices for the other five blocks.

43. The Applicant was unable to explain definitively why the figures for the estimates were considerably lower than the actual costs of the works. Mr Phillips believed that the most likely explanation for the discrepancy was that the person who had provided the information for the Notice had given the price quoted in the QLTA for a basic roof covering rather than the price for the type of roof covering (a new three layer system) which was installed on the blocks.

44. The Applicant, however, accepts that, whatever the reason may be for the figures given for the estimate, the difference between the estimated costs and the actual costs incurred was so substantial that the notice of intention may not have satisfied the statutory requirements. The

Applicant suggested that the decision of the Court of Appeal in *Reedbase* v *Fattal* [2018] EWCA 840 supported this conclusion.

45. The Tribunal is, therefore, satisfied that the marked discrepancy between the estimated costs and the actual costs amounted to a breach of the consultation requirements set out in schedule 3 of the 2003 Regulations.

46. The mere fact that the Applicant has breached the consultation requirements in two respects is not sufficient in itself to refuse dispensation from consultation requirements. As explained earlier the criterion for deciding whether to grant or refuse dispensation from consultation is whether the leaseholders has suffered relevant prejudice with reference to the statutory protections given to them if unconditional dispensation was granted. The factual burden is on the leaseholders to identify any relevant prejudice which they claim they might have suffered. The burden is not a high one but nevertheless the leaseholders have to demonstrate a creditable case for relevant prejudice.

47. In this case the leaseholders were given the opportunity to make representations on whether they agreed with the application or not. Ten of the 20 leaseholders agreed with the Application, one of whom was the Applicant in respect of flat 9 Mannock House, two leaseholders objected to the Application: Ms Pryer and Mr Pryer-Freeman as personal representatives of the leaseholder of 6 Mannock House and Mr and Mrs Bee of 13 Mannock House, and eight leaseholders have not returned the form.

48. The Tribunal turns to the objections.

49. Miss Pryer and Mr Pryer-Freeman stated that

> "The grounds of my objections are because firstly, the correct process was not followed as the Council did not consult for the correct amount of time. Secondly, and more importantly, the estimated cost of the works which was used during the consultation process were so sustainably different to the actual cost, I believe it renders the process they did follow as pointless and not meaningful.
>
> I would like to understand as part of the evidence the due diligence the council undertook to form the basis of their estimated cost and why this was so different to the actual cost. I would also like a breakdown of every step and engagement they took as part of the consultation process".

50. Mr and Mrs Bee stated that

> "We are applying to the Tribunal under remit of section 27A of the landlord and tenant Act 1985 as section 8 of the Directions (25/11/22) case CH1/29UC/LDC/2022/0063 requires a separate application. We do not feel that the actual cost of the works represents good value and give the following reasons:

- All of the blocks are unlikely to require the same upgrade to 3 layer system.
- How can we be assured that it represents "best value"? There should have been an initial investigation of a small section of roof to determine, before embarking on the full renovation, overall costs. A more accurate and realistic works could have been put to tender. Once engaged on the full 3 layer work the contractors may not charge the same as others. Tenants could then be made aware of the realistic cost through competitive bidding. Therefore the estimate breach was not inadvertent.
- What checks were made on the buildings to make the significant change to the tender for all buildings ensuring good value and why were tenants not consulted about the large increase in cost?

Therefore we believe that the cost increase should be shared with the landlord".

51. The Applicant explained that the roofs were in a very poor state of condition and required replacing. Further the works involved stripping back and replacing the flat roof to the block with a new three layer system, the 'Langley Roofing Systems' proprietary high performance Reinforced Bituminous Membrane (RBM) roofing system and that the installation was covered by a 25 year insurance backed guarantee.

52. The Applicant pointed out that the Notice of Intention clearly explained that the existing roof coverings were to be replaced, and that no leaseholder made observations at the time when they received the Notice. In the Applicant's view if the need for the works had been in doubt at the time of the issue of the Notice it would be reasonable to assume that a leaseholder would have made observations on the scope of the works. The Applicant submitted that given the circumstances that no objections were made at the time, a leaseholder's argument that s/he would have made those observations if a compliant notice had been issued should be rejected. The Applicant concluded that the two objectors had not established a prima-facie of prejudice on the ground that the works were inappropriate.

53. The Applicant argued that Mr and Mrs Bee's observation that the actual costs did not represent "best value", and that the works should have been put to competitive tender had no evidential basis and reflected their misunderstanding of the process. The Applicant pointed out that the works had been subjected to a competitive tendering exercise when the Applicant along with three other local authorities had embarked on the first consultation exercise in relation to the QLTA. The contractor appointed under that exercise was the first placed tenderer, and had scored the best on 'price' of all the eleven tenderers. The Applicant added that the contractor's tendered rates then became the contractually agreed rates under the QLTA and these rates were applied to the costs of replacing the roofs. The Applicant asserted that the rates for the particular elements of the works to the roofs were clearly, and

demonstrably, reasonable, being the rates of the lowest of eleven contractors, resulting from a competitive procurement exercise.

54. The Applicant contended that the representations of Ms Pryer and Mr Pryer-Freeman did not identify prejudice in respect of either paying more for inappropriate work or paying more than would be appropriate for the works undertaken.

55. The Applicant submitted that Mr and Mrs Bee and Ms Pryer and Mr Pryer-Freeman had not identified any prejudice from the Applicant's failure to give the full 30 days for consultation.

56. Finally the Applicant pointed out that no leaseholders in the other five blocks had objected to the Application. The Applicant submitted that there was no basis on which the Application in respect of each of these five blocks might be refused.

57. The Tribunal is satisfied that the Applicant has failed to comply with the consultation requirements laid down by schedule 3 of the 2003 Regulations in two respects: failure to give the full 30 days allowed for observations and the significant discrepancy between the estimated and actual costs of the works.

58. The question for the Tribunal is whether the leaseholders of the 20 flats in the six blocks have suffered relevant prejudice from the Applicant's failures to comply with the consultation requirements in respect of the works to the roof.

59. The Tribunal makes the following findings of fact:

a) The Applicant carried out a compliant consultation exercise in respect of the QLTA which identified the preferred contractor. The outcome of that consultation exercise was that it provided the leaseholders with assurance that the prices for the various aspects of the works to the roof were competitive and that the contractor met the quality standards set by the Applicant.

b) The abridged consultation under schedule 3 is primarily focussed on the question of the necessity for the works in question. The Notice of Intention dated 3 March 2020 explained the scope of the works which included the installation of new flat coverings and gave the reason for the works which were that the existing roof had reached the end of its life expectancy.

c) The Tribunal was satisfied that the works which were carried out and involved the installation of a new three layer system covered by a 25 year insurance backed guarantee met the description of the proposed works in the Notice of Intention.

d) No leaseholder made observations on the Notice of Intention, and the scope of the works proposed.

e) Ten of the 20 leaseholders agreed with the application for dispensation. There were two leaseholders who objected to the application and eight leaseholders who did not respond to the Application.

f) The two sets of leaseholders who objected to the Application have not identified what they would have done differently if they had been given the full 30 days for consultation and had been informed of the correct costs of the proposed works.

g) The Tribunal acknowledges that the discrepancy between the estimated costs and the actual costs of the proposed works was significant. However, the Tribunal has no evidence before it to suggest that the works were inappropriate and that the leaseholders have paid more for the works than they should have done.

60. The Tribunal having regard to all the circumstances, and taking into the views of the other leaseholders, the Tribunal is satisfied that the leaseholders would suffer no relevant prejudice if dispensation from consultation was granted.

Decision

61. **The Tribunal grants an order dispensing with the consultation requirements in respect of the roofing and ancillary works to the six blocks of residential housing known as Fyndon House, Mannock House and as 17-34, 35-40, 41-46 and 47-52 Starle which were carried out in or around October 2020**

62. The Applicant undertook to bear its costs of making this Application and would not seek to add them to the Respondents' service charges. In view of the Applicant's undertaking, the Tribunal makes this a condition of the Order granting dispensation.

63. The Tribunal will provide Mr and Mrs Bee and Ms Pryer and Mr Pryer-Freeman with a copy of the decision. The Tribunal directs the Applicant to supply a copy of the decision to the remaining leaseholders and confirm that it has served the decision on them.

64. The Tribunal confirms that this decision is binding on all the 20 leaseholders who were initially named as Respondents to the proceedings.

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.