FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/29UP/LDC/2023/0027/AW
Property	**:**	Ashby's Point, Walters Farm Road, Tonbridge, Kent, TN9 1FR
Applicant	**:**	Town & Country Housing
Representative	**:**	Cripps LLP
Respondent	**:**	Laura Caden-Howe (Flat 610)
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	**:**	D Banfield FRICS Regional Surveyor
Date of Decision	**:**	3 April 2023

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of repairs to the heating system.

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

The Applicant is to send a copy of this determination to all of the lessees liable to contribute to service charges.

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. The application was received by the Tribunal on 2 March 2023.

2. The Applicant provides a description of the building as:

"*The building is located in Tonbridge, Kent.*
The building is a purpose built 7 storey block of 92 one/two bedroom residential flats, 31 of which are let on long residential leases ("The Long Leases"). The other 60 flats in the building are let on short term tenancies.
Most of the Long Leases were granted/purchased under a shared ownership scheme.
Under the terms of the Long Leases, the leaseholders who own the Long Leases are required to contribute to the cost of repairing/maintaining the Building ("the Building Costs") as a variable service charge.
The Applicant contributes the share of the Building Costs which is attributable to the 60 Flats let on short term tenancies."

3. The Applicant explains that the building has a central communal heating and hot water system which supplies central heating and hot water to all of the flats in the building.

4. The Communal Heating System is currently powered by 16 individual boilers which operate as a "cascade" boiler system. The majority of those individual boilers have failed and the landlord has been advised by its consulting engineers, PCM, that the boilers which have failed should be replaced as a matter of urgency because there is a real risk that the boilers which are still in working order could fail at any time and, if they do, the flats in the building will be left without any heating or hot water for several weeks or months whilst the new parts are ordered and the works to replace them are arranged and carried out.

5. The Applicant goes on to explain that as a failure of the Communal Heating System would inevitably lead to considerable hardship to the leaseholders and the other residents in the building, the Applicant does not feel that the works can be delayed, so it intends to start the process of replacing the failed boilers in the Communal Heating System with immediate effect.

6. The Applicant has described the urgency of the application, description of the works, the consultation being carried out and the reasons why dispensation is required at schedules 2, 3, 4 and 5 attached to the application in more detail.

7. A copy of the letter dated 13 February 2023 sent to all leaseholders is also attached.

8. The Applicant's letter to the Tribunal dated 1 March 2023 confirms that a copy of the application (excluding the copies of the two leases) will be sent to all leaseholders.

9. The Tribunal made Directions on 7 March 2023 setting out a timetable for the disposal and requiring the Applicant to send them to the 31 Lessees named together with a form for them to indicate to the Tribunal whether they agreed with or opposed the application and whether they requested an oral hearing. Those Leaseholders who agreed with the application or failed to return the form, whilst remaining bound by the Tribunal's decision, would be removed as Respondents.

10. Two lessees responded one agreeing to the application and one objecting. Those lessees who did not respond or who agreed with the application are therefore removed as Respondents.

11. Before making this determination, the papers received were examined to determine whether the issues remained capable of determination without an oral hearing and it was decided that they were, given that both the issues and objections are clearly stated, and the Tribunal would not be assisted by receiving oral evidence.

The Law

12. 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.

13. 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;

a. 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.

b. 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.

c. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
d. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.

e. 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).

f. 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.

g. 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.

h. 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.

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

Evidence

14. The Applicant's case is set out in paragraphs 2 to 6 above.

15. Ms Laura Caden-Howe has commented on the application on the following grounds;

- Queries the timescale and estimated cost per Leaseholder and wishes to know the % contribution to be made by TCH towards the works.
- While not disagreeing that the Works are essential, having been without fully functioning heating for a number of years, the claim that there was not sufficient time to complete a consultation period with residents is untrue. The Swale heating engineer who attended my property in January 2023 advised me that these Works would be taking place, I find it unlikely that he, at ground level, was the first to know of these works and so find it very likely that these were already agreed and planned some

time before. This is further backed up by the reaction from the gentleman who attended the residents meeting on Monday with TCH who said ''Contractors shouldn't be sharing that information with you'' and ''we have known for some time'' (that the Works were going ahead).The lift maintenance and repair have been subject to discussions over the past 2 years.

- I further disagree with section 4.0 'Options' of the Option Appraisal and Recommendation Report prepared by Phoenix Compliancy Management, which states that heating plantroom issues are not due to neglect from TCH. In December 2021 the Swale engineer who attended my property stated that TCH knew the heating system was failing, other residents have also made me aware over the years that TCH were aware of these issues. As such, I believe there has been ample time to act before now, I note that the report states that repair components were available, just at a higher cost.

16. In reply the Applicant states;

- The Applicant will be responsible for **66.3%** of the cost of the Works; and the Long Lessees will be responsible for **33.7%.**

- The Applicant was advised by its consulting engineers, PCM, that the Works should be carried out as a matter of urgency because there is a real risk that the boilers which are still in working order could fail at any time and, if they do, the flats in the Building will be left without any heating or hot water for several weeks or months whilst the new parts are ordered and the works to replace them are arranged and carried out. Once the Applicant was in possession of the relevant information and advice from PCM, a decision had to be made by the Applicant on the timing of the works and whether the Applicant should continue to take the risk of relying on a failing boiler plant for the remainder of the winter or take steps to ensure heating and hot water was maintained to all flats in the block. Once the Applicant received the advice from PCM, time was of the essence and the Applicant felt it had to act quickly to avoid the risk the system failing and the residents being left with no heating and hot water and that is why it decided to proceed with the Works before carrying out the S.20 consultation process.

- As stated in the Application, the planned works have been designed by PCM in conjunction with Swale Heating and the boiler manufacturers. PCM consulted with the manufacturers and carried out a feasibility study as part of the process of designing the new system which took place before the Swale heating engineer attended the Building in January 2023. The proposal for boiler renewal was first presented to the Applicant on 12 December 2022. More than one option for the repairs was considered. There then followed a review process involving the

Applicant's heating consultants and lead managers within the Applicant's organisation to consider the advice. The decision as to a way forward had yet been formalised in January and therefore no instructions to commence the Works had been issued at that stage.

- The Applicant was previously aware that there were issues with the communal heating system in the Building and this was kept under review, but these issues have not arisen due to neglect by the Applicant, but due to deterioration of the system over time.
- The Applicant has tried keep the current boiler system running for as long as possible and invested in additional equipment to prolong the life of the plant and machinery. Last winter the Applicant incurred substantial costs by installing new water treatment equipment to the system as it was advised at the time that improving water quality may resolve the issues with the system and improve the overall function of the communal heating system. This was undertaken solely at the Applicant's cost and none of the cost of those works were sought from the Lessees as a service charge. It later transpired that although these works had been beneficial, and will continue to be beneficial once the new boilers are installed, they did not resolve all of the problems with the system, caused by deterioration of the system over time.
- In January 2023 PCM advised the Applicant that the deterioration had reached the point at which the system could fail at any time, so the Applicant felt it had to act quickly. The Applicant was advised by PCM that simply maintaining the current system was not sufficient to prevent a risk of sudden system failure.
- Therefore, the Works would need to have been carried out at some point in any event due to the deterioration of the system over time, so the leaseholders will not suffer prejudice as a result of the Works being carried out before a consultation process is undertaken and carrying them out without delay reduces the risk of the residents being left without heating and hot water for a prolonged period.

Determination

17. 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.

18. The issue for the Tribunal to determine is whether by not being consulted the Respondent has suffered prejudice. It is for the

Respondent to identify relevant prejudice and for the Applicant to provide evidence to the contrary.

19. The only issue for the Tribunal is whether prejudice has arisen due to the lack of consultation. Challenges to whether the eventual costs are reasonable or payable are matters for an application under S.27A of the Landlord and Tenant Act 1985 and are not part of this application.

20. The Respondent does not challenge the necessity of the works only the timing and whether the works are due to the neglect of the Applicant.

21. The sequence of events leading to the commencement of the works has been explained by the Applicant however this is not a relevant issue in the Tribunal's determination. Likewise the matter of alleged neglect is a matter that can be considered under an application under S.27A but not here.

22. The only other issue for the Tribunal is the failure to obtain competitive quotations and whether this has resulted in increased costs. The Respondent has not raised this point and no evidence has therefore been provided to assist the Tribunal.

23. In the absence of evidence of prejudice affecting the Respondent the Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of repairs to the heating system.

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

25. The Applicant is to send a copy of this determination to all of the lessees liable to contribute to service charges.

D Banfield FRICS
3 April 2023

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.