



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

Case Reference	: CHI/45UG/LDC/2023/0044/AW
Property	: The Fallows, Fairfield Road, East Grinstead, West Sussex RH19 4QD
Applicant	: McCarthy & Stone Retirement Lifestyles Limited
Representative	:
Respondent	: The Leaseholders
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	: 22 May 2023

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of works to replace the central heating inhibitor.

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

The Applicant will send a copy of this decision to each lessee.

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. This retrospective application was received on 12 April 2023.

2. The property is described as a:

“Purpose built block of flats comprising of one and two bedroom apartments, age-restricted community for the over Sixties.”

3. The Applicant describes the works as:

“To carry out the flushing we will need to access each plot flushing from the plant room round each circuit with fresh clean water. The old water within the system will then be discharged to drain. Once dynamically flushed we will add 90 Litres of X-800 cleaner this needs to be circulated at 40 degrees overnight to chemically clean the system. Once cleaner has circulated round the system we will need to access each Plot UFH manifold to flush the under floor heating circuits, during this time the residents will be without heating or hot water via the ASHP, they will however have hot water via the immersions on the cylinders. We expect this process to take 4 days. By carrying out the dynamic flush we can remove the old inhibitor and replace with X 100 a proven product to protect boiler heat exchangers. Inhibitor is vital to protect the system against corrosion and ensuring longevity of the system components. The report indicates that there is a presence of SRB (Sulphate reducing bacteria) although not detected the absence of Sulphate indicates this has been consumed by Bacteria. Based on the estimated system volume we need to add [sic] 1 ltr of Triacide to the system”

4. Dispensation is sought because:

“PH levels are out of balance and the longer left the more decay will occur in the system. The aluminium heat exchangers are the most vulnerable part because they are made from a soft metal. This could result in the system failing, leaving homeowners without heating and hot water.”

Further,

“Homeowners have been kept up to date verbally by the House Manager. A letter from McCarthy Stone to Homeowners, will be sent along with the Directions, once received.”

5. The Tribunal made Directions on 19 April 2023 setting out a timetable for the disposal. The Tribunal required the Applicant to send them to the parties together with a form for the Leaseholders 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 would be removed as Respondents although they would remain bound by the Tribunal's Decision.
6. On 27 April 2023 the Applicant confirmed that the Tribunal's directions had been sent to the Lessees. The Tribunal received 5 responses all of which were in favour of the application and on 12 May 2023 the Applicant also confirmed that no objections had been received.
7. No requests for an oral hearing were made and the matter is therefore determined on the papers in accordance with Rule 31 of the Tribunal's Procedural Rules.
8. 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 the application remained unchallenged.

The Law

9. 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.
10. 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

11. The Applicant's case is set out in paragraphs 2 to 4 above.

Determination

12. 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.
13. In this case five Lessees have indicated their support for the application and no objections have been received. No prejudice has been identified by the Lessees and as such the Tribunal is prepared to grant the dispensation required.
14. The Tribunal therefore grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of works to replace the central heating inhibitor.

15. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.
16. The Applicant will send a copy of this decision to each lessee.

D Banfield FRICS
22 May 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.