FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal reference	**:**	**CAM/33UG/LDC/2023/0020**
HMCTS code (audio, video, paper)	**:**	**V: CVP REMOTE**
Property	**:**	**All leasehold stock owned and managed by the council**
Applicant	**:**	**Norwich City Council**
Respondents	**:**	**The leaseholders**
Proceedings	**:**	**Dispensation with consultation requirements**
Tribunal members	**:**	**Judge Ruth Wayte**
Date of decision	**:**	**3 November 2023**

DECISION

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(1) The Tribunal determines that an order for dispensation under section 20ZA of the 1985 Act shall be made dispensing with all of the consultation requirements as set out in Schedule 2 to the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations") in relation to the placing of a new qualifying long term agreement for insurance of Norwich City Council's leasehold stock.

(2) The tribunal further orders under section 20C of the 1985 Act that all the costs incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents represented by Ms Holtom.

Direction for service

By **20 November 2023** the Applicant shall make a copy of this decision available to all Respondents by publication on its website or other suitable means in its discretion.

Explanatory note

This decision relates solely to the statutory consultation requirements, as explained below. It does not concern the issue of whether any service charge costs for the relevant insurance will be reasonable or payable. Any such issue might be the subject of an application by the landlord or leaseholders in future under section 27A of the 1985 Act.

Application

1. On 21 March 20231 December 2021, the Applicant landlord applied under section 20ZA of the 1985 Act for a determination dispensing with the statutory consultation requirements in respect of entering into a long term agreement with a new insurer for its leasehold housing stock. The application explained that although they had previously entered into a long term agreement with Avid Insurance Services in April 2022, following full consultation, that insurance had been terminated by the insurer from March 2023. The short notice meant that full consultation was impossible before a fresh insurance policy was secured for April 2023.

2. By sections 20 and 20ZA of the 1985 Act, any relevant contributions of the Respondents through the service charge towards the costs incurred under the agreement would be limited to a fixed sum (currently £100) unless the statutory consultation requirements, prescribed by the Service Charges (Consultation etc) (England) Regulations 2003 (the "Regulations") were: (a) complied with; or (b) dispensed with by the tribunal. In this application, the only issue for the tribunal is whether it is satisfied that it is reasonable to dispense with the consultation requirements and if so on what terms.

Procedural history

3. On 31 May 2023 the tribunal issued directions. These required the Applicant to by 19 June 2023 send to each of the leaseholders copies of the application form and documents enclosed with it, brief details of the insurance placed and the directions. That date was extended by the tribunal due to difficulties with meeting that deadline due to the scale of the task – the Applicant advising there were some 4500 leaseholders to be served. The directions included a reply form for any Respondent leaseholder who objected to the application to return to the tribunal

and the Applicant. Any such objecting leaseholder was to respond by 10 July 2023. The Applicant was permitted to produce a reply.

4. Following receipt of several leaseholder reply forms and a statement produced by Alice Holtom, a leaseholder and solicitor, on behalf of herself and 6 other leaseholders, I decided that the application should be listed for a hearing by video conference. By a letter dated 1 August 2023 the tribunal advised the parties that any objection must focus on the extent, if any, that the tenants have been prejudiced by the failure of the landlord to comply with the consultation requirements, in accordance with the principal authority of *Daejan Investments Limited v Benson* [2013] UKSC 14. While the majority of the objections were in relation to the increased cost of the insurance, the tribunal pointed out that such issues might be capable of amounting to prejudice where the landlord had entered into a long term agreement and would therefore delay any future market testing until that agreement expired. Further directions were given to prepare the matter for the hearing.

5. That hearing took place on 24 October 2023. At the hearing the Applicant was represented by counsel Mr Marcus Croskell. Ms Holtom attended on behalf of herself and several other leaseholders. Prior to the hearing the Applicant had provided a hearing bundle of 273 pages, a skeleton argument and a copy of *Daejan*.

Background

6. The skeleton argument set out the background to the application. The Applicant insure their leasehold housing stock separately from their tenanted stock and had previously entered into a long term agreement with Avid in April 2022, following full consultation in accordance with the Regulations. On 10 January 2023, Avid gave notice of withdrawal of cover from 31 March 2023, in accordance with their early termination clause.

7. The Applicant use Cambridgeshire County Council to assist it to procure their insurance, relying on the expertise of Mark Greenall who also acts on behalf of a number of other local authorities. Following termination of the Avid policy, Mr Greenall undertook an accelerated procedure under the Public Contract Regulations 2015 to invite bids from a new insurer. The contract notice was published on 23 January 2023 with a return date of 8 February 2023. No bids were received.

8. Mr Greenall therefore approached specialist Lloyd's of London insurance brokers, Gallagher UK to assist with obtaining a policy by 1 April 2023. That led to the contract with Protector Insurance for a term of three years with the option to extend for a fourth. The policy was very similar to the previous policy entered into save for the cost, which the Applicant accepts is considerably higher, with the premium for 2023/24 amounting to £475, 879.73.

9. The Applicant accepts that any leaseholder's contribution under the lease will exceed the £100 threshold triggering the requirement for consultation but submit that in the circumstances there was no time to fulfil those duties and therefore seek dispensation to allow for the full cost of the insurance to be recovered from the leaseholders under their leases.

Law on dispensation

10. Under section 20ZA of the 1985 Act, the tribunal has jurisdiction to dispense with all or any of the consultation requirements in relation to any qualifying long term agreement "*…if satisfied that it is reasonable…*" to dispense with the requirements. In *Daejan*, Lord Neuberger for the majority observed [at 40-41] that it would be inappropriate to interpret this as imposing any fetter on the exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself and any other relevant admissible material. The circumstances in which applications for dispensation are made: "*…could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules.*" He confirmed [at 54] that the tribunal: "*…has power to grant a dispensation on such terms as it thinks fit - provided, of course, that any such terms are appropriate in their nature and their effect.*"

11. By reference to sections 19 to 20ZA of the 1985 Act, Lord Neuberger said [at 43] that: "*…the obligation to consult the tenants in advance about proposed works goes to the appropriateness of those works, and the obligations to obtain more than one estimate and to consult about them go to both the quality and the cost of the proposed works.*" Given that purpose, it was indicated [at 44] that the issue on which the tribunal should focus when entertaining an application for dispensation: "*…must be the extent, if any, to which the tenants were prejudiced … by the failure … to comply …*" and [at 45]: "*…in a case where it was common ground that the extent, quality and cost of the works were in no way affected by … failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason)…*"

12. Lord Neuberger referred [at 65] to *relevant* prejudice, saying the only disadvantage of which tenants: "*…could legitimately complain is one which they would not have suffered if the Requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted.*" He noted [at 67] that, while the factual burden of identifying some relevant prejudice would be on the tenants: "*…the landlord can scarcely complain if the LVT views the tenants arguments sympathetically, for instance by resolving in their favour any doubts whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a*

proper opportunity to make their points." Further guidance on terms of dispensation is at [68].

The dispute between the parties

13. As stated above, the main complaint was in respect of the increased cost of the policy. By the time of the hearing, Ms Holtom had focused her challenge on the Applicant having previously agreed a policy which could be cancelled on minimal notice, meaning that they were then left with insufficient time to consult and a very poor bargaining position with the new insurer, leading to an 89% increase in the cost of insurance. She submitted that the tribunal should consider refusing the application to balance the increased costs between the Applicant and their leaseholders. By way of an example, she paid £68.59 in respect of the Avid policy and would now have to pay £129.63. Limiting her contribution to £100 would share those increased costs more fairly.

14. Ms Holtom identified further prejudice as a result of the likely increase of the Applicant's management fee. It was not entirely clear what this fee was for and how it formed an item of expenditure for which the council was entitled to charge a service charge but Ms Holtom appeared to claim that it was calculated as a percentage of the premium and therefore would increase in line with the increased insurance costs.

15. Ms Holtom also requested the tribunal to make an order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord from passing their costs of the application through the service charge. That application was on a number of grounds, including the failure to consult and the terms of the lease.

16. Mr Greenall gave evidence that early termination provisions were a standard term in any insurance contract. In Avid's case, they had lost their underwriter and were therefore unable to provide cover after 1 April 2023. The insurance market for bulk public sector contracts at that time was small and was now even tighter, with only 3 providers. Protector had come second in the procurement exercise carried out when Avid was appointed and were the only option available to the council this year. By entering into a long term agreement the Applicant had obtained a 5% discount on the premium. He recognised that the cost had increased substantially but considered that the risks faced by the insurer had also increased, while their capacity had decreased due to the fall in the number of providers. The cost of using the broker was not passed on to the leaseholders and the commission paid by the insurer was capped at 2.5%.

17. Mr Croskell submitted that in truth the leaseholders' arguments were all about the increased cost of the insurance which was not prejudice caused by the failure to consult. Similarly, any argument that the

Applicant was at fault for negotiating a weak contract with Avid, which was denied, was also not prejudice caused by the failure to consult in respect of the new contract with Protector. Any argument the leaseholders may have in respect of increased costs were a matter for an application under section 27A of the 1985 Act and not a reason to refuse dispensation.

18. He submitted that the leaseholders had also benefited from a 5% discount per annum in return for a long term contract.

19. The Applicant's adviser confirmed that they would not be seeking costs in respect of the application from any of the leaseholders.

The tribunal's decision

20. In the circumstances of this case, the tribunal considers that it is reasonable to dispense with the consultation requirements in respect of the long term agreement for leaseholder insurance. The failure of Avid cannot be laid at the Applicant's door – the contract was effectively frustrated by the withdrawal of the underwriter. As Ms Holtom accepts, the termination by Avid meant that it was impossible for the Applicant to consult and ensure that insurance would be in place for 1 April 2023. In any event, it is difficult to see what consultation could actually achieve in respect of bulk insurance contracts, given the state of the market and the specialist knowledge required.

21. Despite the able attempt by Ms Holtom to argue prejudice, the increased costs of the new insurance with Protector are clearly a market issue and have no link with the failure to consult. As she admitted, individual policies of insurance bear no resemblance to block insurance. In any event, if Ms Holtom can produce evidence to support her claim that the costs are excessive, the appropriate route is via an application under section 27A. That same point applies to any increased management costs.

22. Although the Applicant have indicated that they do not propose to pass the costs of the application to the leaseholders, the tribunal considers that for the avoidance of doubt it is just and equitable to make an order under section 20C of the 1985 Act in respect of those leaseholders represented by Ms Holtom, as the price of seeking indulgence from the tribunal. I cannot make a wider order as there is no application on behalf of those leaseholders, although this is probably academic in the light of the Applicant's concession.

Name: Judge Ruth Wayte

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).