FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/00KF/LDC/2023/0025**
Property	**:**	**All properties accommodating dwellings lease to any of the respondents**
Applicants	**:**	**1. South Essex Homes Ltd.** **2. Southend-on-Sea City Council**
Representative	**:**	**Elsie Anakwue Legal Department Southend-on-Sea City Council**
Respondents	**:**	**All leaseholders of the dwelling at the Properties who may be liable to pay a service charge towards costs incurred under the relevant agreement (see below)**
Representative	**:**	**None**
Landlord	**:**	**Southend-on-Sea City Council**
Type of Application	**:**	**S20ZA of the Landlord and Tenant Act 1985 - dispensation of consultation requirements**
Tribunal	**:**	**N. Martindale FRICS**
Hearing Centre	**:**	**Cambridge County Court, 197 East Road, Cambridge CB1 1BA**
Date of Decision	**:**	**3 November 2023**

DECISION

Decision

1. The Tribunal grants dispensation from any of the requirements on the applicant to consult all leaseholders under S.20ZA of the Landlord and Tenant Act 1985, in respect of the qualifying works referred to.

2. Terms of the grant of dispensation to the applicant are set out below. The grant only takes effect when ALL conditions, have been fully met.

3. Supplementary Directions on the invitation to all parties for costs submissions are also set out below.

Background

4. The landlord applied to the Tribunal under S20ZA of the Landlord and Tenant Act 1985 ("the Act") for the dispensation from all or any of the consultation requirements contained in S20 of the Act.

5. The application related to the commissioning of a range of extensive programmed construction works at the Properties.

Directions

6. Directions dated 14 June 2023 were issued by Judge David Wyatt of the Tribunal, without an oral hearing.

7. There are two applicants. The first, South Essex Homes Ltd. (SEH), an Arms Length Management Organization, (ALMO): The second, Southend-on-Sea City Council (the Council) is also the landlord.

8. They jointly seek dispensation to be granted by the Tribunal, from the requirements for consultation of leaseholders, in respect of a qualifying long term agreement QLTA, concluded between the second applicant and Main contractors *"Diamond Build… in or around 2021"*. The works are valued at around £5M, to be carried out in a period from 2021 to 2024, so not yet concluded. It seems the QLTA is in essence an extensive bid price listing for a wide range of works from the Contractor, which can later be applied to the quantities and any variations, arising later from specific works programmes to a block or blocks.

9. The first applicant referred to the Witness Statement of Mr Jan Tate an employee in the Income Team, for SEH. This is said to be the SEH team which handles Consultations with leaseholders; in this case in matters

general, to the QLTA pricing and; in matters specific, to 11 leaseholders from works arising afterwards to their particular blocks.

10. In retrospect, the applicants became concerned that, in relation to 322No. relevant leasehold properties, they had followed the general procurement requirements under Schedule 1 of the Service Charges (Consultation etc) (England Regulations 2003), rather than those required under Schedule 2. The latter, Schedule 2 relates to qualifying long term agreements for which public notice is required. These are contracts large enough to be treated as Public Procurement, as here. The principle difference between the processes being that leaseholders are not entitled to nominate a contractor to be asked to price (under Schedule 2). As it happened, despite the (incorrect) invitation being made, no contractor nominations had been made by respondents, to the applicant.

11. The applicants were also concerned that, in relation to the 11No. leasehold properties (out of the 322No.) Notices of Intention to carry out roof renewal included estimated costs to the individual leaseholders, which later were about half of what they should have been. The problem appeared to stem from confusion over how many dwellings were located under each roof. Although the applicants state that there was no requirement to provide such details and that they had voluntarily done so, only to get them wrong.

12. In Para (6) of the Directions *"Application: The only issue for the tribunal in this application is whether it is reasonable to dispense with the statutory consultation requirements.* ***This issue does <u>not</u> concern the issue of whether any service charge costs will be reasonable or payable.***"

13. During the hearing the Tribunal reminded the parties of its reading of Lord Neubergers account of the decision in **Daejan Investments v Benson & Others [UKSC 2013]**. When considering whether to refuse or grant dispensation and it the latter, on what terms. The Tribunal reminded parties that such terms should include reference to:

14. The **applicants' costs** and that the applicant be required to bear them.

15. The **respondents' 'reasonable' costs** and that the applicant be required to bear them.

16. Whether the failure by the applicant to follow the Consultation Regulations resulted in **any "prejudice" to respondent leaseholders** and if so; the quantum, form and timing of any sums and/or other terms of grant necessary so as to place the respondents in the same position as before the breach of procedure took place.

17. During the hearing the Tribunal again reminded the parties, as stated in the Directions, that the issue of whether any service charge costs would be reasonable or payable did not arise in this application. Such questions still remain open for either party to make a separate, later application to the Tribunal to seek to challenge, or in the case of the landlord, to seek to have the Tribunal re-affirm such actual charges as had been or would be levied for these works, as reasonable and payable.

18. The remainder of the Directions principally related to the form content timing and specified methods of delivery of that information to and between leaseholders and respondents from the applicants. In the event there appeared to the Tribunal to have been no significant departure by either party, from these save for the initial sharing of records data by the applicant. This appeared to have been substantially remedied by an extension of time by the Tribunal to all parties.

19. The Tribunal received a paper bundle from the first applicant. The application was determined on the bundle received from the applicant and on the evidence, questioning and submissions presented at the hearing, by video link.

20. Besides the Tribunal, there were twelve people in attendance at the hearing. Respondent leaseholders: Mr Lee, Mrs Davis, Ms Sodipo, Ms Swin, and Ms Vanessa Hallinan, the last of whom provided a written statement included within the bundle. The other attendee leaseholders or former leaseholders, did not provide any prior statements, though they were invited to ask questions of the applicant.

21. The first applicant (the one which managed the Consultation process) was represented by Mr Peter Jolley of Counsel. The second applicant was not in attendance and was not represented. Also in attendance were other officers of SHE; Mr Williams (Income Management Officer, Ms Birtwhistle (Legal Assistant), Ms Iruskieta (Legal Assistant), Mr Baltrop (Trainee Legal Assistant), Ms Anakwue (Solicitor), Ms Anderson (Income Management Manager).

Applicant's Case

22. The first applicant called Ms Anderson was witness. The first applicant had filed two witness statements. The first, (Bundle p.190 onwards) an expanded statement from Mr Jan Tate of SEH. The second, (Bundle p.210 onwards) very short, from Ms Anderson, his former line manager. Counsel explained that Mr Tate was no longer employed by SEH but, that Ms Anderson had adopted the wording of his statement as confirmed in her own brief statement, filed. Counsel referred the Tribunal to both. The Tribunal and Ms Hallinan in turn, asked questions of Ms Anderson's evidence and about the Bundle in general.

23. Ms Anderson went through the materials as summarised in the application and Mr Tate's statement. She confirmed that the applicant sought dispensation from Consultation in respect of the general QLTA (as already summarised in the Directions) and in respect of the specific provision of estimated costs to 11No. leaseholder, one of whom was Ms Hallinan Boston Avenue. The latter concerned some 11 homes, 10No. in Boston Avenue and one in Mendip Road. Here blocks assumed to be, for example of 4 dwellings, had apparently only contained 2 dwellings (not 4 as incorrectly assumed by the applicant in their estimates to each leaseholder). This meant that the true estimated cost whilst expected to be spread 4 ways, rather than the 2 ways in the end, the actual bill to the leaseholders, had apparently doubled. Despite this the applicant denied that there had been prejudice to leaseholders.

Respondent's Case

24. The Tribunal received a written statement (undated), also incorporated (Bundle p.264-266) from Ms Hallinan, respondent leaseholder. There were no statements from any other leaseholders in the Bundle. No other leaseholders gave evidence but, they were permitted to seek clarification from the applicant's witness on background matters. Some answers were given by Ms Anderson to their questions.

25. Ms Hallinan said that she was only aware of this application on 5 July 2023. (This was though compliant with the Tribunal's Directions for service). However whereas the applicant should have made all documents available on line from 7 July 2023, she states that it took until 18 July 2023, after she had complained to them on 13 July 2023. She only had until 21 July 2023 to respond.

26. The applicant was required by Tribunal Directions at Para 2b) *"confirm to the tribunal by email that this has been done and stating the date(s) on which this was done."* The Tribunal saw the correspondence between Ms Hallinan on and around (Bundle p.251) but, did not find the statement from the applicant back to the Tribunal to confirm their dates of compliance with the Directions by the time period required, save for the letter of 16 August 2023 from SEH to the Tribunal. By then on complaint from Ms Hallinan to the applicant and to the Tribunal, the dates for compliance and filings were extended by the Tribunal. By that time a Tribunal hearing had also been requested by one or more leaseholders.

27. The Tribunal notes the majority of internal correspondence between the first applicant and its advisers and some of the leaseholders included within the Bundle. However the Tribunal finds the endless strings of out of date order, often repetitive messages, incorporating lengthy footnotes, mostly serves to confuse the narrative, where it exists. The Tribunal

suggests that by including such extensive, apparently jumbled often internal, information in the bundle, supports a contention that the applicant is poorly organised. It is extremely hard to follow any narrative from it.

28. Ms Hallinan recounts the defects with the process adopted by the applicant as they have already admitted to, by their following 'Schedule 1', when they should have followed the requirements of 'Schedule 2'. She states (Bundle p.264) *"…This error potentially denies leaseholders, including myself, the opportunity to participate fully in the consultation process, leading too a lack of transparency and an unfair disadvantage for us as stakeholders."*

29. Ms Hallinan continues: *"**Schedule 1** requires landlords to provide leaseholders with estimates or quotations for the proposed works. These estimates should be as accurate as possible and based on realistic assessments of the costs involved. By following Schedule 1, the council would have been obliged to disclose the actual estimated costs for each leaseholder's individual contribution during the consultation process, rather than the cost of the total works which did not give any indication of the cost per household."*

30. Ms Hallinans statement continued (Bundle p.264): *"**Inaccurate Estimates:** In their notices of intention to carry out roof renewal works, Southend Council provided estimates for the individual leaseholders' contributions, which were significantly lower (about 50%) that the actual cost. This misrepresentation has created confusion and uncertainty among the leaseholders, including myself, as we were not adequately informed about the true financial implications of the roof works. This inaccuracy has the potential to impose a financial burden on the leaseholders that was not anticipated, affected our financial planning and well being. In addition to providing estimates for the individual leaseholders' contributions that were significantly lower that the actual costs, Southend Council's misrepresentation has also denied leaseholders the opportunity to independently investigate the costs and explore potentially more affordable alternatives… Had the accurate costs been disclosed during the consultation process, leaseholders could have proactively sought competitive quotes from other contractors or explored alternative approaches that might have resulted in more cost-effective solutions."*

31. Ms Hallinan refers to the ***"Overall execution of the roof works"*** where she states *"… it is crucial to be bring to the tribunal's attention our dissatisfaction with the overall execution of the roof works."* The Tribunal confirms however, that these matters whilst important and significant to the leaseholders and the determination of any final service charge arising being reasonable and payable, do not however relate

specifically to the Consultation process prior to those works, which the Tribunal and the parties can only be concerned with here.

32. Ms Hallinan also refers (bundle p.266) to ***"Concerns about Overall Costs and Request for Independent Review"***. The same comments apply to this material as per the proceeding paragraph.

33. Ms Hallinan refers to ***"Personal Impact and Financial Burden".*** *"Personally I have invested an extensive amount of time seeking legal advice and attempting to communicate with the council to seek clarification on the roof works and the inaccurate estimates provided. However, the communication between the council and the stakeholders, including myself, appears to have been severely lacking. This lack of effective communication gives the impression that the council does not value the concerns and input of the leaseholders, especially it would appear the 11 affected leaseholders who share similar apprehensions about the process."*

The Law

34. S.18 (1) of the Act provides that a service charge is an amount payable by a tenant of a dwelling as part of or in addition to the rent, which is payable for services, repairs, maintenance, improvements or insurance or landlord's costs of management, and the whole or part of which varies or may vary according to the costs incurred by the landlord. S.20 provides for the limitation of service charges in the event that the statutory consultation requirements are not met. The consultation requirements apply where the works are qualifying works (as in this case) and only £250 can be recovered from a tenant in respect of such works unless the consultation requirements have either been complied with or dispensed with.

35. Dispensation is dealt with by S.20 ZA of the Act which provides:- **"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."**

36. The consultation requirements for qualifying works under qualifying long term agreements are set out in Schedule 3 of the Service Charges (Consultation Requirements) (England) Regulations 2003 as follows:-

1(1) The landlord shall give notice in writing of his intention to carry out qualifying works –

(a) to each tenant; and
(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall –

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
(b) state the landlord's reasons for considering it necessary to carry out the proposed works;
(c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;
(d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure
(e) specify-
(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the period on which the relevant period ends.

2(1) where a notice under paragraph 1 specifies a place and hours for inspection-

(a) the place and hours so specified must be reasonable; and
(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

3. Where, within the relevant period, observations are made in relation to the proposed works or the landlord's estimated expenditure by any tenant or the recognised tenants' association, the landlord shall have regard to those observations.

4. Where the landlord receives observations to which (in accordance with paragraph 3) he is required to have regard, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made state his response to the observations.

Decision

37. The scheme of the provisions is designed to protect the interests of leaseholders and whether it is reasonable to dispense with any particular requirements in an individual case must be considered in relation to the scheme of the provisions and its purpose.

38. The Tribunal must have a cogent reason for dispensing with the consultation requirements, the purpose of which is that leaseholders who may ultimately pay the bill are fully aware of what works are being proposed, the cost thereof and where appropriate to have the opportunity to nominate contractors in relevant cases.

39. The applicant draws attention of the Tribunal to two failures. Regarding the first, it appears the only defect, is to have followed Schedule 1 rather than the Public Procurement requirement (due to the potential value) under Schedule 2, the latter not requiring the landlord to invite nominations. Although the applicant invited nominations from the leaseholders, unnecessarily, none were received by the applicant and the tender otherwise proceeded in line with the Regulations.

40. Regarding the second failure, the applicant maintains that whilst it grossly underestimated the costs of the works for 11 leaseholders, it was not required to provide individual pricing estimates for each leaseholder. While it regrets the mis-information error in the estimates for roof works to these 11 properties, it does not consider that there is any prejudice to the leaseholders in these 11 cases, either.

41. The Tribunal is sympathetic to the views expressed by Ms Hallinan. On the face of it, at this stage, this particular respondent and perhaps others may wish to apply to the Tribunal separately under 'S.27a Landlord and Tenant Act 1985 (the standard form for service charge challenge) at a subsequent date. Such apparent shortcomings in pricing an estimated cost from the applicant are however not sufficient, in the view of the Tribunal to amount prejudice to prevent a grant of dispensation from following the Consultation procedure, on terms. There being no prejudice, no terms to compensate the leaseholders notional loss are included.

42. The Tribunal inquired of the applicant as to their draft terms of grant as none were submitted with their application or bundle, simply a request for an unfettered grant of dispensation. This is not however, what is required.

43. The Tribunal drew attention of both parties to its view of the implications for terms of grant arising from the decision from **Daejan Investments Ltd V Benson & Others [2013 UKSC14]**. A full copy of which, may be found here: https://www.supremecourt.uk/cases/uksc-2011-0057.html

44. At Para 73 of that decision: Lord Neuberger writes: *"I have in mind that the landlord would have to pay its own costs of making and pursuing an application to the LTT for a section 20(1)(b) dispensation, to pay the tenant's reasonable costs in connection of investigating and challenging that application, to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the LVT will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue."*

45. More generally and to be sure that costs are not included in a future service charge and/or administrative charge (below), at some later dates, by an error of the applicant, the Tribunal is minded to make an Order under S.20C Landlord and Tenant Act 1985 20C: Limitation of service charges: costs of proceedings: https://www.legislation.gov.uk/ukpga/1985/70/section/20C

46. *(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court* ***[F2****, residential property tribunal****]*** *or leasehold valuation tribunal* ***[F3****or the First-tier Tribunal****]****, or the*** ***[F4****Upper Tribunal****]****, or in connection with arbitration 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 tenant or any other person or persons specified in the application."*

47. For the same reasons, the Tribunal is also minded to make an Order under Schedule 11 Para 5a of the Commonhold and Leasehold Reform Act 2002: Limitation of administration charges: costs of proceedings: https://www.legislation.gov.uk/ukpga/2002/15/schedule/11#:~:text=Limitation%20of%20administration%20charges%3A%20costs,in%20respect%20of%20litigation%20costs.

48. ***"[F9****5A(1)A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs. (2)The relevant court or tribunal may make whatever order on the application it considers to be just and equitable."*

Supplementary Directions on Costs Submissions

49. The Tribunal outlined these proposed terms of grant of dispensation, if made, to the assembly at the hearing. It was confirmed that a final decision on applicant's costs, on respondents' costs, recoverability and quantum, would follow on from the decision on the principle point of "prejudice". Relevant respondents' costs will be those which arise on or after each respondent first received notice of this application, to and

including submission of any representations of costs by the deadline below.

50. The applicants and the respondents who at least filed a Tribunal "Reply Form" with either or both Applicants, and/ or with the Tribunal in response to this application are invited to make written representations only, on their entitlement to costs arising from this application and the quantity of those costs they consider are 'reasonable'. **These are to be received no later than 4pm on 22 November 2023 at the Tribunal Office.**

51. Every representation on costs from respondents should clearly state the respondent's full name, case date 1 November 2023, the case title (set out above), case reference (set out above) their particular property address for which they are the leaseholder and should be accompanied by a completed and signed Form N260 incorporating these details (guidance below).

52. When making those written representations, parties are invited to consider the full case report, **Daejan v Benson [UKSC 2013]** Found here: https://www.supremecourt.uk/cases/uksc-2011-0057.html

53. Parties are also referred to the following general ***"Guide to summary of assessment of costs".*** https://www.judiciary.uk/wp-content/uploads/2021/08/Guide-to-the-Summary-Assessment-of-Costs-2021-Final1.pdf

54. The reader will find reference at Para 7 of this **Guide,** to the standard paper **Form N260A** which can be obtained here: https://www.gov.uk/government/publications/form-n260-statement-of-costs-summary-assessment

55. Para 21-26 of this **Guide** refers in particular to **'litigants in person'** as applies to all leaseholders, as all appear to be here. The Tribunal assumes that (unless specific financial loss can be shown for some or all of the time spent) the recoverable hourly rate due is £19. Whilst this is a modest sum, the Tribunal accepts that litigants in person are likely to take very considerably longer in completing related tasks, than would professionals advising litigants.

56. **In making its determination of this application, the Tribunal does not concern the issue of whether any service charge costs are reasonable or indeed payable by the leaseholders. The Tribunal's determination is limited to this application for dispensation of consultation requirements under S20ZA of the Act.**

N Martindale FRICS **3 November 2023**