FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/29UH/LDC/2023/0117
Property	:	Flats 1 – 230 Scotney Gardens Maidstone Kent flats 4 11 12 19 21 22 24 26 28 29 42 46 50 80(2) and (3)
Applicant	:	Scotney Gardens RTM Management Company Limited
Representative	:	Mr Cockburn, counsel, instructed by Spencer West LLP
Respondent	:	Ivor Bates Sriram Sithamparapillai
Representative	:	
Type of Application	:	Application for dispensation of all or any of the consultation requirements - section 20 of the Landlord and Tenant Act 1985.
Tribunal Member(s)	:	Regional Judge Whitney Mr B Bourne MRICS Mr D Ashby FRICS
Date of Hearing	:	24 January 2024
Date of Decision	:	16 February 2024

DECISION

Background

1. There are three applications before the Tribunal. The first is an application for dispensation from consultation requirements and relates to a long term qualifying agreement in respect of the management of the Property. The second two applications are for determinations in respect of service charges and administration charges claimed by the Applicant from the second Respondent.

2. Directions were made by the Tribunal on 13 October 2023 and 7th October 2023.

3. The Applicants provided a bundle and references in [ ] are to the pdf page numbers within that bundle.

4. The matter was listed for an in person hearing at Havant Justice Centre on 24th January 2024 to deal with the application for dispensation and the other two applications. In fact the Tribunal only heard the application for dispensation.

5. The Applicants had made various case management applications and we issued determination and directions document in respect of the same on 24th January 2024. In respect of the dispensation application the Applicant sought leave to rely on a witness statement of Mr Monk which had been served but omitted from the bundle and also various statements from leaseholders in support of dispensation. We allowed the witness statement of Mr Monk to be admitted but declined to admit the various statements from leaseholders.

6. Mr Bates did not attend the hearing. He had emailed in the Tribunal in the early hours of the day fixed for the hearing. We considered whether or not we should proceed and determined that we would do so. Full reasons are given in the Directions previously provided to the parties dated 24th January 2024.

7. Mr Sithamparapillai did not attend but we took account of his written objections.

The Law

8. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations provide that where the lessor intends to enter into a qualifying long term agreement being an agreement for more than 12 months, with a cost of more than £100 per annum the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum unless the required consultations have been undertaken or the requirement has been dispensed with by the Tribunal. An application may be made retrospectively.

9. Section 20ZA provides that on an application to dispense with any or all of the consultation requirements, the Tribunal may make a determination granting such dispensation "if satisfied that it is reasonable to dispense with the requirements".

10. The appropriate approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of Daejan Investment Limited v Benson et al [2013] UKSC 14.

11. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

12. The factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it. The Tribunal should be sympathetic to the lessee(s).

13. Where the extent, quality and cost of the works were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

> "I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be- i.e. as if the requirements had been complied with."

14. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the Lessee will be or has been caused relevant prejudice by a failure of the Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted.

15. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

16. If dispensation is granted, that may be on terms.

17. The effect of Daejan has been considered by the Upper Tribunal in Aster Communities v Kerry Chapman and Others [2020] UKUT 177 (LC), although that decision primarily dealt with the imposition of conditions when granting dispensation and that the ability of lessees to challenge the reasonableness of service charges claimed was not an answer to an argument of prejudice arising from a failure to consult.

The Property

18. The Property was a development in Maidstone consisting of 230 flats. Each flat contributed equally towards the service charges. Originally management had been undertaken by St Peter Street (Maidstone) Flat Management Company Limited. However in September 2014 an RTM Company acquired the right to manage and authorised the management company referred to within the leases to manage the block.

Hearing

19. Mr Cockburn of counsel represented the Applicant at the hearing. Mr Hay, director, attended and gave evidence. The Tribunal had a combined hearing bundle of 1382 pdf pages. We also had a copy of the statement of Mr Monk dated 30th November 2023 and a skeleton argument provided by Mr Cockburn.

20. We reminded those present that in determining the application for dispensation we would only be considering that point. In so determining we make no findings as to whether or not any part of the sums involved are payable or reasonable. Such matters are left until the Tribunal determines the application pursuant to Section 27A of the Landlord and Tenant Act 1985.

21. Mr Cockburn explained there were two contracts for which the Applicant sought dispensation. Both related to the appointment of managing agents. The first in 2013 [34] to Peco Domains Limited and the second in 2016 [48] to Peco Flat Management. Whilst different names the controlling party was a Mr Beirne who was also a leaseholder at the Property.

22. It appears Mr Beirne continues to manage the development for the Applicant. The contract was renewed in 2020 but the renewal and all subsequent renewals are not Qualifying Long Term Agreements.

23. Mr Cockburn accepted that both agreements were Qualifying Long Term Agreements. Each was for a term exceeding 12 months and required the leaseholders (who all paid equally) to contribute more than £100 towards the costs of the same. It was accepted that no consultation had been undertaken and unless dispensation was granted the statutory cap would apply.

24. Mr Cockburn suggested that the Applicant's had gone out to tender. They had asked three organisations to tender for the work: Mr Beirne, Cobbs Property Services and DMG Property Management. Cobbs Property Services had declined to tender [33]. DMG Property Management had tendered [73] but the directors had preferred and considered the tender from Mr Beirne [71] to be cheaper.

25. Mr Cockburn accepted in 2016 no tenders had been undertaken and effectively this was just a renewal of the existing agreement with the fee increased in accordance with the earlier agreement.

26. At this point the Tribunal adjourned as it was unclear exactly what the terms agreed with Peco were (see [46 & 47]).

27. Upon resumption Mr Cockburn explained that Peco were paid in accordance with [47] a fee for management and then a separate amount for what were termed disbursements which were passed on at cost.

28. Mr Cockburn called Mr Hay. He confirmed the contents of his statement [417-434] were true.

29. He explained he became a director in 2019 but purchased his flat in 2007. He did not know who had provided the company with professional help in drawing up the contract. He thinks it may have been another resident at the property.

30. He understood Mr Beirne resigned as a director prior to tendering for the contract to avoid a conflict. He explained the service received from Mr Beirne was very bespoke and does much more than he thinks a typical managing agent would do. He stated he was not sure who decided to divide the costs into a fixed fee plus separate disbursements. He is aware that at the AGM's of the Respondent company there had been debate about what is included as disbursements and what is not included within the management fee.

31. Mr Hay explained that Mr Beirne has an assistant. When he is in Switzerland he arranges for them to cover. Another leaseholder, Mr Rowley conducts a lot of work for Mr Beirne. His work is charged as a disbursement.

32. Mr Hay was limited as to what he could answer given he was not a director at the time of the contracts.

33. Mr Hay stated in his opinion what Mr Beirne provides is competitive although he accepts not cheaper than the quote from DGM. He stated that the arrangement might be said to be unorthodox but does provide value.

34. The contract was renewed he understood as at that time the Company was looking at possible enfranchisement and lease extensions. Mr Beirne was involved in these and so it was felt beneficial to remain with him. The price going forward was he understood as per the previous contract with the price reviews allowed for in that contract.

35. Upon conclusion of the evidence Mr Cockburn briefly summed up the case. He sought dispensation without conditions. In his submission

whilst the service may be said to be unorthodox it was beneficial. It is noteworthy that Mr Beirne continues to provide this service.

Decision

36. We thank Mr Cockburn for his submissions. We have taken account of all within the bundle including the objection of Mr Bates and the objection of Mr Sithamparapillai which we have dealt with separately.

37. Turning to Mr Sithamparapillai's objection the matters he raises appears to relate to his dissatisfaction in respect of the window replacement project. This seems to be a separate issue as to whether or not we should grant dispensation to the Company for the 2 contracts granted for the management.

38. We make clear that in making our determination we make no findings as to whether the charges levied by the two Peco organisations are amounts which leaseholders are required to pay or reasonable. Such determinations are entirely separate and Mr Bates is pursuing a separate challenge as to his liability to pay and the reasonableness of all such charges both basic fee and disbursements for which separate directions have been given.

39. It was suggested that originally in 2013 a competitive tender process had been undertaken and Peco were the cheapest quote. We are not satisfied this is correct. The terms of the contract offered to Peco differ from the tender exercise in various ways. This means that the tender from each of the two companies who responded are not the same. Further Peco were aware they would have the use of an office at the Property. It is not clear whether this was made clear to the other tendering companies.

40. We do have concerns that whilst it appeared to be suggested that the price was to be an inclusive price for the provision of services in fact under the agreement with Peco they receive a fee for management and the ability to recharge other costs as what is referred to as disbursements.

41. We note that in 2016 it is accepted there were no alternative tenders obtained. The contract was effectively simply renewed. The contract remains ongoing but now on terms which cannot be said to be a qualifying long term agreement. Supposedly this is because the majority of leaseholders support the ongoing appointment of Mr Beirne via his Swiss based entity Peco Flat Management.

42. We are satisfied that both agreements being those in 2013 [34] and 2016 [48] are Qualifying Long Term Agreements for which there should have been consultation given the costs payable under each require in excess of £100 per annum to be paid. This appeared to be accepted by all.

43. We turn now to the question of whether any prejudice has been identified. We have considered the case of both Respondent leaseholders. Mr Bates' objection begins at [241]. Many of the matters raised relate to challenges as to his liability to pay and the reasonableness of the charges. It is hard to see what else he may have done if he had been consulted. It is clear he has spoken to DMG who have at times remained interested in managing.

44. On balance as to the question of dispensation, even adopting a generous approach as suggested in Daejan we are not satisfied that Mr Bates has identified any prejudice.

45. We remind ourselves that the decision making process is one for the Company to take. Whilst account should always be taken of leaseholders views the ultimate decision is the Company's. They did try and obtain alternative quotes to give some rational to the process notwithstanding that it seems clear Mr Beirne was preferred given his previous experience.

46. We do have concerns over the process appointing Mr Beirne. It plainly was not an arms length tender. The terms under which he took the contract differed from those referred to in the original tender and he clearly had information which assisted him. A good example is the fact he knew an office would be available without charge for his use at the development. This is a significant matter for a managing agent particularly given the unusual service levels required which Cobbs at least felt was too onerous to allow them to provide a tender.

47. We also note we had no evidence from the managing agent despite their remaining instructed. This may have assisted the process not least as to the renewal in 2016.

48. We do take account of the fact that only two leaseholders (although representing 15 flats) have objected. No objections have been received from others and certainly the Tribunal itself received reply forms from other leaseholders agreeing with the application. Although we did not admit the further statements the Company said it has collected this is supported by those responses received by the Tribunal itself. This is a matter for us to consider.

49. Overall considering all the evidence we find that we should grant dispensation conditional upon a copy of this decision being provided to all the leaseholders. This dispensation applies to the contracts for management granted in 2013 to Peco Domains Limited and the contract in 2016 to Peco Flat Management.

50. In so determining we make no findings in respect of whether or not leaseholders are liable to pay any such costs associated with these contracts or about the reasonableness of any aspect of these charges.

51. We note that Mr Bates has previously made an application for orders pursuant to Section 20C and Paragraph 5A to limit his ability to pay towards such costs. We shall hear representations and determine the same following the determination of the outstanding service charge application.

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

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.