FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UH/LDC/2023/0161
Property	**:**	Various Properties of Wealden District Council (1)
Applicant	**:**	Wealden District Council
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	**:**	26 February 2024

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of entering into a QLTA with Aspen for the provision of insurance services.

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

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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 28 November 2023 and concerns a qualifying long-term agreement that has already been entered into.

2. The properties concerned are described as,

   A. The Council's sheltered accommodation housing stock, consisting of 49 properties on 6 estates

   B. Leasehold properties sold by the Council through Right to Buy, consisting of 205 flats

   C. Shared ownership properties sold by the Council, consisting of 12 houses

3. The Applicant states that the qualifying long-term agreement relates to,

   An insurance policy entered into further to the Council's covenant with its long leasehold tenants to insure and keep insured the Development (including the Property) against loss or damage by fire including all other usual comprehensive risks and such other risks as the Council may from time to time consider desirable to the full rebuilding cost thereof and to any extent in excess of such amount and against such other risks as the Council may from time to time deem necessary or prudent and to pay the premiums on any such insurances upon the due date and in the event of damage by fire or other cause to lay out forthwith all monies received from any such insurance in rebuilding and reinstating the Development and making good such damage. ["Property" means flats and houses demised to tenants and "Development" means the estates where these flats and houses are].

4. Further the Applicant explains that,

   1.On 22nd March 2021, the Council placed the insurance of its leasehold stock with Avid, an insurer which re-insured its risks with Accellerant Insurance Europe SA. The agreement with Avid was that Avid would provide the Council with insurance for three consecutive years by way of annual policies.

   2.This was a Qualifying Long Term Agreement ("QLTA"). The consultation requirements of Section 20 of the Landlord and Tenant Act1985 ("LTA85") were complied with.

   3.The Avid agreement was due to expire on 31st March 2026. On 18th January 2023, Avid informed the Council that Accellerant was withdrawing from the public sector insurance market. As a result, Avid would not be offering the agreed renewal terms for the year commencing 1st April 2023 or thereafter. Avid further informed the Council that all insurance cover would cease from 23rd March 2023 as a result of the decision of Accellerant. Avid did indicate that it would

continue to search for a replacement re-insurer, but that no reliance should be placed on this eventuality.

4.On 27th January 2023, the Council instructed AJG, its insurance broker, to provide a report on the most economical options for one-year policies offering cover appropriate to the Council's insuring obligations.

5.On 20th March 2023, AJG reported to the Council. Due to a downturn in insurer appetite for the public sector market, AJG were unable to get any quotations for one-year insurance policies, and only two quotes for insurance covering three years by successive annual policies. One had an annual premium for the first year of £67,350.23, whereas the other (provided by Aspen) was £33,163.51.

6.The terms of the Aspen policy included the following "Long Term Undertaking" expiring on 31st March 2026: -

The Insured undertakes to offer at each renewal until the expiry date shown in the Schedule the insurance under this Policy on the terms and conditions in force at the expiry of each Period of Insurance and to pay the premiums annually in advance it being understood that (a) The Insurer shall be under no obligation to accept an offer made in accordance with the said undertaking (b) the Sums Insured or limits of Indemnity or liability may be reduced at any time to correspond with any reduction in value or business This undertaking applies to any Policy(s) which may be issued by the Insurer in substitution for this Policy.

7.The Long Term Undertaking is therefore an offer to accept the insurer's terms for the years 2024-5 and 2025-6. This term (if it does have contractual effect) on its face gives the insurer a substantial commercial advantage.

8.However, it was necessary for the Council to insure its leasehold housing stock in order to discharge its duty under the insurance covenant mentioned above and in order to ensure that the Council was not exposed to the risk of meeting uninsured liabilities. The view of AGL was that Aspen offered the better value for money of the only two options.

9.The effect of the Service Charges (Consultation Requirements) (England) Regulations 2003 is that the Council would have to prepare a notice under Schedule 1 of the 2003 Regulations and send it to all affected residents, allowing them thirty days to comment on the proposed QLTA. However, the Council did not have any prospective agreement to consult on until 20th March 2023, and had to get insurance in place by 23rd March 2023. There was no sense in attempting even a non compliant consultation exercise.

5. The Tribunal made Directions on 2 January 2024 which required the Applicant to send it to the Lessees 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. If the Leaseholders agreed with the application or failed to return the form they would be removed as a Respondent although they would remain bound by the Tribunal's Decision.

6. The Applicant confirmed on 12 January 2024 that the Directions had been served on the Respondents by First Class post and on 20 February 2024 that no responses had been received. The Tribunal received six responses all in agreement with the Application. No requests for an oral hearing were made. The matter is therefore determined on the papers in accordance with Rule 31 of the Tribunal's Procedural Rules.

7. 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

8. 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.

9. 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

10. The Applicant's case is set out in paragraphs 2, 3 & 4 above.

Determination

11. 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.

12. No objections have been received from the Respondents identifying the type of prejudice referred to in the Daejan case and in these circumstances I am prepared to grant dispensation.

13. **The Tribunal therefore grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of entering into a QLTA with Aspen for the provision of insurance services.**

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

15. The Tribunal will send copies of this determination to those six lessees who responded to the Tribunal.

D Banfield FRICS
26 February 2024

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.