FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LDC/2023/0252**
Property	:	**Whitehouse Apartments, 9 Belvedere Road, London, SE1 8YP**
Applicant	:	**Southbank Management Company Limited**
Representative	:	**Mr Howell, Director of the Applicant**
Respondent	:	**(1) All leaseholders of Whitehouse Apartments, 9 Belvedere Road, London, SE1 8YP** **(2) Mrs Virginia Purle** **(3) Mr Richard Garrett**
Representative	:	**(1)Not applicable** **(2) In person** **(3) In person**
Type of application	:	**Application for dispensation to consult – section 20ZA of the Landlord and Tenant Act 1985**
Tribunal members	:	**Judge Tueje** **Mrs L Crane MCIEH CEnvH**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of hearing	:	**26th February 2024**
Date of decision	:	**26th March 2024**

DECISION

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In this determination, statutory references relate to the Landlord and Tenant Act 1985 unless otherwise stated.

Decision of the Tribunal

(1) The Tribunal grants dispensation pursuant to s.20ZA in respect of the supply and installation of three new boilers with associated pipework, and the supply and installation of a new linked Building Management System (the "Works"). The Works were carried out by Vertex Services Group, and costing £1,111, 281.00 excluding VAT.

The Application

1. This Application under section 20ZA, is dated 10th October 2023, and seeks dispensation from the consultation requirements in respect of the Works required at Whitehouse Apartments, 9 Belvedere Road, London, SE1 8YP (the "Property").

Background

2. The Property is a mixed-use development converted in around 1999-2000 from previously commercial premises. It now consists of 372 residential units and 4 commercial units. Whitehouse Apartments Freehold Limited is the Landlord. The Applicant, is Southbank Management Company Limited, the management company, which is a party to the tripartite leases.

3. Heating and hot water is provided communally, supplied by three boilers, with associated infrastructure and pipework linked to a Building Management System ("BMS"). Boiler 1 was an original boiler. Boilers 2 and 3 broke down, and were replaced in 2017. Replacement boiler 2 broke down on 18th February 2019, and replacement boiler 3 broke down in around March 2020. Replacements boilers 2 and 3 were therefore replaced with new boilers in 2020. New boiler 3 broke down in 2022, and new boiler 2 developed faults with the possibility it may fail. Consequently, on 9th August 2022 the Applicant gave notice to leaseholders of its intention to replace new boilers 2 and 3.

4. In a feasibility report dated 17th February 2023 prepared by Hollis Global, various options were discussed; the report concludes there are two realistic options. Firstly, to replace the existing boilers and infrastructure so retaining a communal supply. Secondly, and subject to a comprehensive electrical survey to assess its feasibility, introducing a new system providing heating and hot water to each apartment individually. Kinleigh Folkard and Hayward ("KFH"), the block managing agent, sought a second opinion from another consultant who supported Hollis Global's findings.

5. On 29th March 2023, the Applicant gave notice of its intention to carry out the Works, which would replace all three boilers, including the original boiler which was still functioning. Mrs Purle's response to this is

contained in a letter dated 25th April 2023. Ms Barnes, a Senior Property Manager at KFH, responded on 15th September 2023. Amongst other things, Ms Barnes addressed why the building required three boilers and a new BMS. Mrs Purle and Ms Barnes exchanged further e-mails about this in subsequent months.

6. The Applicant received the following estimates from:
   6.1 Vertex Services Group for £1,111,281.00 plus VAT; and
   6.2 Henshall & Sheehy for £1,163,543.41 plus VAT.

7. Also, in respect of the Works, Hollis Global's fees to manage the Works were 8.5% of the tender price, with a minimum fee of £96,000 plus VAT. In the Tribunal's experience, those fees are within the typical range for this sector. KFH's fee was 3% plus VAT of the tender price, which was a term of its block management agreement.

8. In an e-mail sent on 4th October 2023, the maintenance manager reported new boiler 2 had failed, leaving only one working boiler on site. This application was made shortly afterwards, and is dated 10th October 2023.

9. The reason for applying for the dispensation is stated in the form as follows:

   The heating and hot water for apartments in the building is provided by a system comprising three boilers and associated infrastructure and pipework linked to a building management system, which needs upgrading. Two of the boilers have now failed, and the third back up boiler is at risk of failing at any time. The proposed works are to replace all three boilers, and to provide a temporary boiler on site for the works period. If the third boiler fails before the works start, the apartments will lose their supply of heating and hot water.

   The risk is appreciably increased if commencement of the works is delayed to complete the stage 2 consultation.

   There is also an increased risk that the temporary boiler will also fail, because of the longer period it will be needed on site. The best option therefore to minimise the risk of serious disruption to residents and to save costs is to commence the works at the very earliest opportunity, without completing the stage 2 consultation. The contractors are able to start work on 18th October.

10. On 18th October 2023 KFH, on behalf of the Applicant, sent out the notice of estimates in respect of the Works, notifying leaseholders the estimates could be inspected at KFH's office. The letter also set out observations received in response to the notice of intention, and KFH's response.

11. Despite her requests by e-mail on 23rd October and 7th November 2023, and even visiting the agent's offices in person on 3rd November 2023, the estimates were not made available for Mrs Purle to inspect.

12. Following receipt of the Application, the Tribunal made a directions order dated 30th October 2023. Paragraph 2 of the directions order required any leaseholder who objected to the Application to provide their response by 27th November 2023. Two leaseholders objected to the Application: Mrs Purle and Mr Garrett.

13. The Application was subsequently listed for a hearing on 26th February 2024.

The hearing

14. The following attended the hearing:

    - Mr Howell, director of the Applicant company;
    - Mrs Purle, a leaseholder objecting to the Application;
    - Mr Garrett, a leaseholder objecting to the Application;
    - Mr Jain, a leaseholder and board member;
    - Mr Griffiths, the building manager;
    - Mr Carruthers, a director of Hollis Global; and
    - Mr Benson from KFH.

15. Mrs Purle's written response to the Application is set out in a letter dated 28th November 2023 (no issue was taken with the timing).

16. Mr Garrett did not wish to give evidence, but sought to rely on a written response to the Application dated 13th February 2024, which Mr Howell had not previously seen. Mr Garrett explained the reason his objections were late was due to his wife's ill-health, which had been diagnosed in recent months. Mr Howell said he would prefer that Mr Garrett's late objections were not admitted, but would not oppose their admission if the Tribunal considered them useful.

17. Taking into account the reasons that Mr Garrett's objections were late, that they were not strongly opposed by Mr Howell, and that we allowed time for Mr Howell to read them, we considered it was just to exercise our discretion under rule 8 to admit Mr Garrett's written response.

18. We heard from Mr Howell, Mr Griffiths, and from Mr Carruthers on behalf of the Applicant. The latter expanded on the written reasons in the documentation, explaining why the Works, and in particular their scope, was justified.

19. Mr Garrett's written response criticised the failure to consult in respect of the Works, arguing the Applicant had ample opportunity to do so.

20. Mrs Purle's written objections mainly raised issues of reasonableness of the costs of the Works. In particular she questioned the replacement of the still functioning boiler 1, noting the August 2022 plan had been to replace only new boilers 2 and 3. She also questioned whether a total of two boilers would have been sufficient, instead of three, pointing out at that time the building was operating on just one boiler. She criticised the

failure to obtain quotes on both options, namely replacing all boilers and replacing just new boilers 2 and 3. She asked why the existing BMS was to be replaced when it was still functioning.

21. Mrs Purle sought to amplify these points in oral submissions. When asked about whether there had been any relevant prejudice as a result of the Applicant's failure to comply with section 20, she refocused her arguments. She submitted the Applicant would have been more concerned about the commercial risk of installing three new boilers, if that decision had been consulted on in accordance with section 20.

22. In other words, the objection is essentially that the section 20 consultation process provided an opportunity to explore the feasibility of retaining the functioning boiler 1 and/or having a total of two instead of three boilers. There would have been a greater risk of the Works being found excessive, if there had been proper consultation more on Mrs Purle's proposed alternatives.

23. Mr Carruthers addressed these points. In summary, he explained two boilers would have insufficient capacity when demand increases, such as during the colder weather and/or if there was full occupancy. He also stated, reducing the capacity for budgetary reasons alone would be a breach of regulatory requirements. He continued, the new boilers had a modular design and heat exchangers which would facilitate maintenance, repair and durability. Finally, the new boilers would not work at maximum efficiency with the existing and dated BMS.

The Legal Framework

24. So far as is relevant, section 20 states:

Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsections (6) or (7) (or both) unless the consultation have been either-

Complied with in relation to the works or agreement, or
Except in the case of works to which section 20D applies, dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by payment of service charges) to relevant costs incurred on carrying out the works under the agreement.

This section applies to qualifying works if relevant costs incurred or on carrying out the works exceed an appropriate amount.

25. Section 20ZA(1) continues:

Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

26. In ***Daejan Investments Limited v Benson and others [2013] UKSC 14*** the Supreme Court provided the following guidance when dealing with section 20ZA applications for dispensation of the statutory consultation requirements:

    26.1 The purpose of sections 19 to 20ZA is to ensure leaseholders are not required to pay any more than is necessary for services provided, and that they are not required to pay for unnecessary or unsatisfactory services.

    26.2 The Tribunal is to focus on the extent to which leaseholders have been prejudiced by a landlord's failure to comply with the requirements under section 20.

    26.3 Ordinarily, where the failure to comply with section 20 had not affected the extent, quality and costs of the works carried out, dispensation is more likely to be granted.

    26.4 The Tribunal's main focus on such applications is what prejudice, if any, have leaseholders suffered.

    26.5 The leaseholders bear a factual burden of identifying some relevant prejudice that they would or might suffer.

    26.6 Where leaseholders make a credible case regarding prejudice, the landlord bears the legal burden to rebut this.

    26.7 If appropriate, the Tribunal may grant conditional dispensation.

The Tribunal's Decision

27. We have reached our decision after considering the oral and written evidence, including documents referred to in that evidence, and taking into account our assessment of the evidence.

28. This determination does not refer to every matter raised by the parties, or every document the Tribunal reviewed or took into account in reaching its decision. However, this doesn't imply that any points raised or documents not specifically mentioned were disregarded. If a point or document was referred to in the evidence or submissions that was relevant to a specific issue, it was considered by the Tribunal.

29. We grant dispensation pursuant to s.20ZA in respect of the supply and installation of three new boilers with associated pipework, and the supply

and installation of the new linked BMS, carried out by Vertex Services Group costing £1,111, 281.00 excluding VAT.

The Tribunal's Reasons

30. Mrs Purle complains she was denied an opportunity of inspecting the estimates when she originally requested this. We do not consider that on its own, or taken together with any other factors, justifies refusing the request for dispensation. That is because it is not directly connected to the relevant prejudice as set out in *Daejan*.

31. The need for this Application arises from the Applicant's admitted failure to complete the statutory consultation process. However, on 15th September and subsequently, the Applicant did respond to Mrs Purle's observations. While it was delayed, the Applicant responded fully to Mrs Purle's observations on the notice of intention.

32. We take into account that new boiler 2 failed on 4th October 2023, leaving just one functioning boiler. Therefore, we consider the Works were necessary to avoid the risk that that the one functioning boiler might fail when demand inevitably increased as the weather got colder. Both these factors meant the Works were urgent. That urgency justifies the request for dispensation from the statutory consultation process.

33. We find it is unlikely the Applicant would have adopted Mrs Purle's alternative proposals, even if it had completed the statutory consultation. Hollis Global's February 2023 feasibility report comprehensively explored various options. Its findings were supported by the second opinion KFH obtained. As set out at paragraph 23 above, Mr Carruthers addressed the specific points Mrs Purle raised in oral submissions.

34. In light of what Mr Carruthers said, it's understandable the Applicant decided against incurring the cost and delay that would result from obtaining a feasibility study based on Mrs Purle's alternative proposal. Furthermore, there is no requirement to do so under section 20.

35. Mrs Purle's expectation that the Applicant would obtain estimates for replacing only boilers 2 and 3 (instead of all 3), also goes beyond the scope of the statutory consultation process, which simply requires it obtains estimates on the Works contained in the notice of intention. Mrs Purle doesn't appear to have obtained these estimates herself, or if she did, she has not provided them to us.

36. There is no evidence before the Tribunal indicating that the Applicant's failure to comply with the section 20 requirements has affected the quality of the Works carried out.

37. By paragraph 2 of the directions order, the leaseholders were afforded an opportunity to object to this Application. We take into account that of the 372 residential leaseholders, only two have raised objections. This indicates the vast majority of leaseholders do not consider they have

suffered prejudice, as it's likely they would have objected to the Application if there had been any prejudice to them.

38. We are satisfied that the Works were required to the Property to prevent the forthcoming risk of the communal heating and hot water supply failing. In the circumstances, and in light of the decision in *Daejan,* we are satisfied that it is reasonable to grant dispensation from the consultation requirements.

39. We should make it clear that we are not making any findings as to the reasonableness, the cost, or the standard of the Works.

Name: Judge Tueje **Date:** 26th March 2024

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).