FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**HAV/23UE/LDC/2024/0509**
Property	**:**	**Various Properties of the Guinness Partnership Limited**
Applicant	**:**	**The Guinness Partnership Limited**
Representative	**:**	**Trowers & Hamlins LLP**
Respondents	**:**	**186 leaseholders of the Property**
Type of Application	**:**	**Application for the dispensation of consultation requirements pursuant to S.20ZA of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge Hugh Lumby** **Ms C Barton MRICS** **Ms T Wong**
Venue	**:**	**Havant Justice Centre (by VHS)**
Date of Hearing	**:**	**7th November 2024**
Date of Decision	**:**	**20th November 2024**

DECISION

Decision of the Tribunal

The Tribunal grants the application for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 (Section 20ZA of the same Act). The dispensation is subject to the condition that none of the landlord's costs of the tribunal proceedings may be passed to the Respondents as lessees through any service charge or charged direct to the Respondents as an administration charge under the Respondents' leases.

The background to the application

1. The Applicant is a social landlord owning a large portfolio of properties, with a total of 9,725 leaseholders. In 2021 it decided to carry out a procurement exercise to find insurers to cover the various risks against which it required cover for a period of at least three years. This included a block insurance in respect of all of its properties. This meant that a single insurance policy would cover all of the Applicant's properties rather having individual policies at block or estate level. Due to the size of the insurance required, the Public Contracts Regulations 2015 required a public notice to be issued, inviting bids.

2. As the proposed agreement with the selected insurers would cover a period over twelve months, the Applicant was required to carry out a consultation with all of its leaseholders in accordance with section 20 of the Landlord and Tenant Act 1985. A Notice of Intention was sent to its leaseholders on 22 December 2021. Following the decision to appoint Zurich to provide the insurance policy for the property portfolio, a Notice of Proposal was also sent to the leaseholders on 12 May 2023. The insurance cover commenced on 1 June 2023 and was renewed a year later.

3. The initial intention was to charge each leaseholder across the portfolio an equal amount for insurance, being £370. This was the amount included in estimated service charges issued to leaseholders.

4. It subsequently emerged that, due to what was described as human error, 186 leaseholders were omitted from the consultation. The Applicant says that this arose from the deletion of their names and addresses from the Excel spreadsheet used to populate the letters sent to leaseholders containing each of the notices. The issue came to light when various leaseholders questioned the demands sent to them.

5. As a result, the Applicant lowered the amount claimed on account for insurance from the 186 affected leaseholders from £370 to £104. As the insurance policy had come into effect, it was too late to carry out a fresh consultation and so the Applicant instead applied to the Tribunal for dispensation from the requirement to consult with those leaseholders.

6. The Applicant is the owner of the reversion to the various affected properties (either as freeholder or long leaseholder) and the Respondents are the 186 leaseholders inadvertently excluded from the consultation process.

7. The Applicant has applied for dispensation from the statutory consultation requirements in respect of the entry into an agreement with Zurich to provide insurance for the Applicant's property portfolio. The application was received on 20 August 2024.

8. The Tribunal issued Directions dated 4 September 2024 in relation to the conduct of the case. These provided that a hearing would be held to determine the application if it was opposed. 12 responses were received from the Respondents, with ten objecting to the application and two supporting it. Accordingly, this hearing was organised to consider the application.

9. The hearing was conducted by VHS, with the panel being in the hearing room in Havant and the parties being remote. Mr Simon Allison appeared as counsel for the Applicant. Mr Kevin Dunleavy, Ms Natasha Sorrell-Kaur, Mr Chris Brown and Mr Paul Connolly of the Applicant were also present together with Ms Camilla Waszek from Trowers & Hamlins LLP, the Applicant's solicitors, and Mr Chris Gibb from Gibbs Laidler Consulting LLP, the Applicant's insurance advisers. Mr William Brown, who is one of the Respondents, appeared in a personal capacity.

10. The Tribunal had been provided with a bundle running to 332 pages in advance of the hearing, together with a skeleton argument from Mr Allison on behalf of the Applicant. Mr Brown had also sent a note of clarification to the Tribunal in advance of the hearing and this was also considered.

The issues

11. The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements. This application does not concern the issue of whether or not service charges will be reasonable or payable. The Tribunal has made no determination on whether the costs are payable or reasonable. If a Lessee wishes to challenge the payability or reasonableness of those costs as service charges, including the possible application or effect of the Building Safety Act 2022, then a separate application under section 27A of the Landlord and Tenant Act 1985 would have to be made.

Law

12. Section 20 of the Landlord and Tenant Act 1985 (as amended) ("the 1985 Act") and the Service Charges (Consultation Requirements) (England) Regulations 2003 require a landlord planning to enter into a contract for

a period of over twelve months to consult the leaseholders in a specified form.

13. Should a landlord not comply with the correct consultation procedure, it is possible to obtain dispensation from compliance with these requirements by an application such as this one before the Tribunal. Essentially the Tribunal must be satisfied that it is reasonable to do so.

14. The Applicant seeks dispensation under section 20ZA of the 1985 Act from all the consultation requirements imposed on the landlord by section 20 of the 1985 Act.

15. Section 20ZA relates to consultation requirements and provides as follows:

"(1) 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.

(2) In section 20 and this section—
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.
....
(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.
(5) Regulations under subsection (4) may in particular include provision requiring the landlord—
(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
(b) to obtain estimates for proposed works or agreements,
(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

16. The regulations referred to are the Service Charges (Consultation Requirements) (England) (Regulations) 2003 with the consultation requirements set out in the schedules (the "2003 Regulations"). Schedule 2 deals with the procedure for qualifying long term agreements for which public notice is required. This is the applicable schedule in this case.

17. In the case of *Daejan Investments Limited v Benson* [2013] UKSC 14, by a majority decision (3-2), the Supreme Court considered the dispensation provisions and set out guidelines as to how they should be applied.

18. The Supreme Court came to the following conclusions:

a. The correct legal test on an application to the Tribunal for dispensation is: "Would the flat owners suffer any relevant prejudice, and if so, what relevant prejudice, as a result of the landlord's failure to comply with the requirements?"

b. The purpose of the consultation procedure is to ensure leaseholders are protected from paying for inappropriate works or paying more than would be appropriate.

c. In considering applications for dispensation the Tribunal should focus on whether the leaseholders were prejudiced in either respect by the landlord's failure to comply.

d. The Tribunal has the power to grant dispensation on appropriate terms and can impose conditions.

e. The factual burden of identifying some "relevant prejudice" is on the leaseholders. Once they have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

f. The onus is on the leaseholders to establish:

i. what steps they would have taken had the breach not happened and

ii in what way their rights under (b) above have been prejudiced as a consequence.

19. Accordingly, the Tribunal had to consider whether there was any "relevant prejudice" that may have arisen out of the conduct of the Applicant and whether it was reasonable for the Tribunal to grant dispensation following the guidance set out above.

Respondents' objections

20. The following objections were received from the Respondents, asserting prejudice arising from the failure to consult with them:

- Flat 19, Jardin House (Yolanda Williams) – the Applicant had failed to report a data breach; had demonstrated negligent behaviour which would be emboldened by granting dispensation, encouraging further negligence; its failure to notify the change in insurance potentially placed

leaseholders in breach of obligations to notify mortgagees; the references to Daejan were an attempt to intimidate the Tribunal.

- Flat 26, Jardin House (William Benson) – the same objections as Flat 19, Jardin House.
- Flat 13, Jardin House (William Brown) – the Applicant had not provided full information and had erroneously referred to Marsh not Zurich winning the tender; objected to the balance of the £370 insurance premium being collected from him for 2024/25 as he had been assured that the total was £104 for the year; the additional payment would disrupt his budget for the year; the consultation carried out was not compliant with schedule 1 of the 2003 consultation regulations; he had lost the opportunity to nominate a tenderer; the Applicant should have compared the cost of insuring this block on its own against the cost of a portfolio-wide block policy.
- Flat 14, Winch House (Ka Yiu Lam) – the Applicant had failed to report the data breach which demonstrated pattern of negligent behaviour which had caused mental distress; had previous complaints about communication; its failure to notify the change in insurance potentially placed leaseholders in breach of obligations to notify mortgagees; the references to Daejan were an attempt to intimidate the Tribunal.
- Flat 28, Jardin House (Rami Najim) – similar objections as Flat 19, Jardin House.
- Flat 22, Jardin House (Dominic Anderson) – the Applicant's failure to serve the consultation notices was a breach of Landlord and Tenant Act; this had caused mental distress; had demonstrated a pattern of negligent behaviour which would be emboldened by granting dispensation, encouraging further negligence.
- Flat 37, Block 17 (Kathryn Emily Taylor) – the Applicant should not be able to act unilaterally; had been assured there would be consultation if anything goes wrong; agreeing the dispensation would further limit her position and strength as a leaseholder.
- Flat 22, Winch House (Ghislaine Granger and Nick Rampling) – the Applicant had misprocessed their data; concern of potential future prejudice and mismanagement if the dispensation was agreed.
- Flat 21, Jardin House (Alexander Warwick-Smith) – the Applicant had not explained the changing levels of premium demanded; a further demand would disrupt his budget for the year; prejudiced by failure to notify the data breach.
- Flat 3, Jardin House (Stefano Ortona and Carolina Vaccari) – the Applicant had produced the annual statement without mentioning the service charge cost increase; the failure to consult meant they had no opportunity to provide feedback or oppose the increase; potential data misuse and data misprocessing.

Applicant's response to objections

21. The Applicant argued that none of the objections amounted to relevant prejudice (as referred to in *Daejan*). For ease, they responded to common points together. The Tribunal has adopted this approach in summarising their arguments as follows:

- GDPR/data breach – the Applicant contends there was no actual breach of the GDPR rules, all that happened was that their names and addresses in an Excel spreadsheet were deleted. In any event, no "relevant prejudice" was suffered by them as a result of that deletion.
- Changes to service charge amounts – it explains that the lowering of the amount claimed for insurance was to ensure that the demand was in compliance with section 20 of the Landlord and Tenant Act 1985, there was no "relevant prejudice" in any event as the statements referred to were estimates only and so open to change at the year end.
- Consultation not compliant with the 2003 Regulations – the Applicant says it was, following schedule 2 as the correct schedule.
- Nomination of a contractor – the Applicant argues that schedule 2 of 2003 Regulations does not permit consultees to nominate potential contractors in any event.
- Individual insurance vs portfolio insurance – the Applicant contends that arguments on whether a particular approach could be cheaper are outside the scope of this application; any leaseholder can make an application pursuant to section 27A of the Landlord and Tenant Act 1985 if it wishes to challenge whether the amount is reasonable.
- References to ***Daejan*** – the Applicant explains that this is the leading case on dispensation which is binding on the Tribunal. Any attempt to intimidate the Tribunal is denied.
- Requirement to notify to mortgage providers – the Applicant's case is that the change of policy is not relevant to the consultation which was about the process to obtain a new provider.
- Failure to explain changes to service charge costs – the Applicant says that this is irrelevant to the failure to consult and no "relevant prejudice" has been suffered.
- Future mismanagement – the Applicant's position is that the grant of dispensation in one case does not release it from the obligation to consult in the future.

William Brown objections

22. Mr Brown explained his primary objection to the application was that he had received an unequivocal response from the Applicant that £104 was all he would be obliged to pay for insurance in the 2024/25 service charge year. He produced an email evidencing this. He confirmed that he would withdraw his objections if the Applicant agreed that no further amounts would be payable in relation to insurance for the 2024/25 insurance year.

23. The Applicant agreed that as he had received the specific confirmation referred to, no further sums in relation to insurance would be payable by him in relation to the 2024/25 service charge year. In return, Mr Brown agreed to withdraw his objection to the application.

24. Mr Brown also asked about the treatment of any of other Respondents who had received similar confirmations. The Applicant had stated that no other such confirmations had been given. In any event, only he had

provided evidence of such a confirmation and the agreement was limited to him. The Tribunal noted this position; it is open to any of the Respondents in a similar position to raise this with the Applicant together with the appropriate evidence. If not satisfied with the response, it is open for them to bring an application challenging any additional charge pursuant to section 27A of the Landlord and Tenant Act 1985.

25. Subsequent to the hearing, Mr Brown emailed the hearing to state that other Respondents had received similar confirmations. This was submitted too late to be considered at the hearing. The position in any event is as set out in the paragraph above.

Confirmations in hearing

26. The Tribunal raised a number of questions with the Applicant during the hearing.

27. In response to a query about the £25,000 per annum "bursary" paid by Zurich to the Applicant, it was confirmed that this was not retained by the Applicant but instead spent on risk management activities. These were actions intended to reduce the risk of an insured event occurring and so benefited all the parties, including the leaseholders. It was not commission payable to the Applicant who it was stated received no commission from the insurance policies.

28. Mr Gibb explained that social landlords have to obtain bulk policies because the insurance market for individual buildings in this particular sector is small or non-existent. Insuring buildings individually was not a realistic option.

29. The Applicant confirmed that no GDPR data had been lost as a result of the deletion of the Respondents' names and addresses from the Excel spreadsheet created for the purposes of the consultation.

30. It also confirmed that neither the Respondents nor any other leaseholders would be charged for any part of the Applicant's costs in making the dispensation application. In addition, the cost of the original procurement and related consultation was absorbed within its general management fee so no extra amounts would be charged in relation to that.

Consideration

31. Having listened to the submissions of the parties at the hearing and read the evidence and submissions from the parties provided by them, the Tribunal determines the dispensation issues as follows.

32. It began by considering whether the Respondents were prejudiced by the landlord's failure to comply with its consultation obligations, by losing

their protection from paying for inappropriate works or paying more than would be appropriate. In doing so, it considered each of the objections raised, utilising the categories proposed by the Applicant.

33. The first category was the purported GDPR breach. The Tribunal finds that there was no GDPR breach, with the deletion of the Respondents' names and addresses only being in the mail merge spreadsheet. Whilst this deletion was unfortunate, that deletion was not of itself a breach and there was no misprocessing of data. In any event, the deletion of the data led to the need for the dispensation rather than being a consequence of it. The Tribunal therefore determines that the Respondents did not incur any relevant prejudice as a consequence of their deletion from the spreadsheet.

34. The next category considered was the impact of serving a higher demand for the insurance and then lowering this, the identified prejudice being the impact on annual budgeting when the extra is redemanded. The Tribunal finds that, whilst the Applicant could have dealt with its communications better, the only impact on the Respondents was a cashflow advantage. If any of the Respondents feel the amount of any top up payment demanded is unreasonable, they can make an application for determination of that objection pursuant to section 27A of the 1985 Act. The Tribunal therefore determines that the Respondents did not incur any relevant prejudice as a consequence of the amounts demanded being lowered.

35. The third and fourth categories both related to consultation, objections being that the consultation did not comply with the 2003 Regulations and the Respondents had lost the right to nominate tenderers. The Tribunal finds that the question as to whether the consultation was compliant is irrelevant to this application; the purpose of this case is to dispense with the need to consult with leaseholders who were excluded from that consultation. Only leaseholders who were consulted could have a case to challenge its compliance with the 2003 Regulations. In addition, Schedule 2 of the 2003 Regulations does not give leaseholders a right to nominate tenderers in any event, so no prejudice would be suffered by not being able to do so. The Tribunal therefore determines that the Respondents did not incur any relevant prejudice as a consequence of whether the consultation was compliant or from not being able to nominate tenderers.

36. The fifth category related to the advantages of individual building insurance policies over portfolio insurance. This objection was brought by Mr Brown who withdrew his objection. In any event, the Tribunal accepts the evidence of Mr Gibb that in the social housing sector, individual policies were at best extremely difficult to obtain. In addition, it finds that any challenge on the grounds of cost should be pursued pursuant to section 27A of the 1985 Act. The Tribunal therefore determines that the Respondents did not incur any relevant prejudice as a consequence of the Applicant not considering individual building policies as an alternative.

37. The Tribunal next considered whether the Applicant referring to the case of *Daejan* was an attempt to intimidate the Tribunal. The Tribunal agrees with the Applicant that it was entirely proper to refer to the leading case on relevant prejudice and there was no attempt to intimidate the Tribunal. The Tribunal therefore determines that the Respondents did not incur any relevant prejudice as a consequence of the Applicant's reference to the case of *Daejan*.

38. Some of the Respondents had also referred to prejudice incurred by them in being in breach of their liability to notify insurance changes to their mortgage providers. The Tribunal does not accept that this prejudice occurred as a result of the failure to consult them. The consultation was simply about whether there were objections to the proposed change, not the change itself. In addition, no evidence of such notification requirements was provided. The Tribunal therefore determines that the Respondents did not incur any relevant prejudice as a consequence of any failure to notify mortgage providers.

39. The eighth category related to a failure to notify the leaseholders of the service charge change. The Tribunal finds that no relevant prejudice was incurred as a result. The failure to consult has placed the Applicant at risk of not being able to recover the additional amounts not yet collected whilst the Respondents will be in no worse position than if they had been consulted. The Tribunal therefore determines that the Respondents did not incur any relevant prejudice as a consequence of not being notified of potential service charge changes.

40. The final category related to purported mismanagement and the signal that granting dispensation would send. The Tribunal does not agree that granting dispensation would encourage poor behaviour going forward. Failing to consult in accordance with section 20 of the 1985 Act comes with the substantial risk that dispensation may not be granted, leaving the landlord with irrecoverable costs. Each application is treated on its merits and does not set a precedent for future actions. The Tribunal therefore determines that the Respondents will not incur any relevant prejudice as a consequence of dispensation purportedly encouraging future poor behaviour.

41. Accordingly, the Tribunal could not find prejudice to any of the Respondents by the granting of dispensation in this case.

42. The Applicant states that the failure to consult with the Respondents was inadvertent. On the evidence before it, the Tribunal agrees with this conclusion and believes that it is reasonable to allow dispensation in relation to the subject matter of the application.

43. The Tribunal notes that the Applicant has stated that it will not recover any costs of this application from the Respondents. The Tribunal was invited to rely on that statement as sufficient reassurance to the

Respondents and so no condition to dispensation should be added to that effect. It considers, however, that given the various mishaps that have been referred to in this case, it is right that the Respondents should have certainty on this. As a result, it determines that dispensation should be given on the condition that no costs are recoverable from the Respondents, either through the service charge or direct as administration charges.

44. The Tribunal therefore grants the Applicant's application for dispensation from the consultation requirements of section 20 of the Landlord and Tenant Act 1985 in respect of the insurance contract the subject of its application. The dispensation is subject to the condition that none of the landlord's costs of the Tribunal proceedings may be passed to the Respondents as lessees through any service charge or charged direct to the Respondents as an administration charge under the Respondents' leases.

45. The Applicant shall place a copy of the Tribunal's decision on dispensation together with an explanation of the leaseholders' appeal rights on its website (if any) within 7 days of receipt and shall maintain it there for at least 3 months, with a sufficiently prominent link to both on its home page. It should also be posted in a prominent position in the communal areas of buildings occupied by the Respondents. In this way, leaseholders who have not returned the reply form may view the Tribunal's eventual decision on dispensation and their appeal rights.

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.

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.