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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/29UB/LDC/2017/0073

Property : Various properties (approximately 275) of which the Applicant is landlord

Applicant : Ashford Borough Council

Representative :

Respondent : The Lessees

Representative :

Type of Application : To dispense with the requirement to consult lessees before entering into a qualifying long term agreement for a framework agreement for replacement windows and doors

Tribunal Member(s) : Mr D Banfield FRICS

Date of Decision : 11 December 2017

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 subject to the Council carrying out the consultations with the affected lessees as described in paragraph 11 below on each and every occasion when it is proposed to incur expenditure which will be charged to the lessees.

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

Background

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 [the 1985 Act] from all of the consultation requirements imposed on the landlord by Section 20 of the 1985 Act in respect of a qualifying long term agreement being a framework agreement for replacement windows and doors where required at the properties of which it is landlord and were listed in their application to the Tribunal.
2. The Tribunal made Directions on 25 October 2017 requiring the Applicant to serve on the Lessees copies of the Directions together with the application, the framework agreement, evidence of any cost savings and a form for the Respondents to complete and return to the Tribunal indicating whether they opposed the application and if an oral hearing was required. Any lessee who objected was asked to send their written reasons by 4 December 2017.
3. As directed the applicant sent a letter to all lessees on 7 November 2017 enclosing the application, the Tribunal's directions the framework award report and the template framework agreement. A certificate of posting was provided.
4. Fourteen lessees responded to the Tribunal of which thirteen were in support of the application. One lessee objected on the grounds of expense and that he wished to choose his own company for replacing windows and doors. None of those who responded requested an oral hearing and as indicated in Directions the Tribunal will determine the application on the papers already received.
5. The only issue for the Tribunal is whether or not it is reasonable to dispense with any statutory consultation requirements. **This decision does not concern the issue of whether any service charge costs will be reasonable or payable.**

The Law

6. The relevant section of the Act reads as follows:

20ZA Consultation requirements:

(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.

7. 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

- The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
- 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.
- Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
- The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
- 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).
- 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.
- 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.
- 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.
- Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

8. As set out in their grounds for seeking dispensation the applicant explains that the Council is the freehold owner of 1594 flats of which 275 are privately owned leasehold. The Council wishes to enter into an existing framework agreement with Procurement for Housing for the supply and installation of replacement windows and doors. On the basis of research by Council officers it is believed that the framework agreement will result in benefits and cost savings. Under the framework agreement the Council would have the ability to contract

with approved contractors whose quality has already been quantified. The subsequent contracts would be awarded by either mini-tender or direct call off. As such leaseholders would not be able to nominate tenderers for the work as only contractors already approved may be included. The agreement runs until 31 March 2020.

9. A copy of the Contract Award Report from Procurement for Housing refers to the windows and doors framework as a new offering from Pfh. There are a number of appointed suppliers and contractors that can deliver a range of supply, distribution and installation requirements that demonstrate value for money. Following an invitation to tender for inclusion on the approved list selection was based on both price and quality leading to the formation of an approved list of contractors divided by area and services offered.
10. In an email to one of the Lessees the Applicant explains that as the application is to join an existing framework agreement consultation as required by S.20 is pointless as lessees would have no opportunity to nominate contractors. They further explain that work would only be carried out on a lessee's property if they were found to be required following a visit from a surveyor.
11. Where work was found to be required a notice of intention to carry out works would be sent to the affected leaseholders and a reduced process of consultation carried out. At the end of that period the specification will be sent to the contractors on the framework who will price the work. The Council will then decide which contractor is successful and send a statement of estimates to leaseholders before work commences.

Determination

12. 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 the requirements.
13. This is an application to join an existing framework agreement and as such it is not possible for the usual consultation with lessees giving them the opportunity to nominate contractors to take place.
14. From the information contained within the Contract Award Report it is clear that contractors have been included on the approved list only following a competitive tender.
15. Should work be identified that is the Applicant's responsibility further, albeit reduced consultation with the lessee concerned would then take place.
13. The Tribunal has received one objection on the grounds that the lessee wished to appoint his own contractor. The Tribunal has had sight of a lease which is said to be typical of all those held by the Respondents

and it is clear from the First Schedule thereto that windows and doors do not form part of the demise and remain in the Council's ownership.

16. As such the lessee does not have the power to appoint his own contractor but must abide by the Council's choice. If dispensation is granted he does however lose the right to be consulted.
17. The Tribunal is satisfied that the potential benefits of entering into the framework agreement for both lessees and the Council outweigh any loss of consultation rights and therefore **grants dispensation from all or any of the consultation requirements of S.20 Landlord and Tenant Act 1985 solely in respect of the replacement of windows and doors and subject to the following terms.**
18. **Dispensation is granted subject to the Council carrying out the consultations with the affected lessees as described in paragraph 11 above on each and every occasion when it is proposed to incur expenditure which will be charged to the lessees.**
19. **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**
20. In accordance with Direction 7 of Judge Agnew's Directions of 25 October 2017 the Applicant will send a copy of this decision to all Respondents within 7 days of receipt.

D Banfield FRICS
11 December 2017

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case. 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.
2. 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.
3. 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 appeal is seeking.