FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/31UC/LDC/2020/0002**
HMCTS	**:**	**P:PAPERREMOTE**
Properties	**:**	**Various properties in the ownership of Nottingham Community Housing Association and Pelham Homes Ltd**
Applicants	**:**	**Nottingham Community Housing Association (1)** **Pelham Homes Ltd (2)**
Representative	**:**	**None**
Respondents	**:**	**The long leaseholders of the Properties**
Representative	**:**	**None**
Type of application	**:**	**Application for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge C Goodall** **Mr V Ward, FRICS – Regional Surveyor**
Date and place of hearing	**:**	**Determined on the papers and without a hearing**
Date of decision	**:**	**23 September 2020**

DECISION

Background

1. The Applicants own the freehold or headlease of 632 properties situated in the counties of Leicestershire, Derbyshire, Northamptonshire, Rutland and Lincolnshire. The Respondents are the lessees of those properties under long leases. In general terms, the Applicants have maintenance responsibilities for those properties which are re-chargeable to the lessees as service charges.

2. Section 20 of the Landlord and Tenant Act 1985 requires that if a landlord wishes to enter into a long term qualifying agreement ("QLTA") (i.e. one which cannot be terminated within the first 12 months), it will be restricted in claiming charges under that agreement unless it consults with the lessees before entering into the agreement.

3. In 2018, the Applicants wished to enter into a QLTA with a company who could provide an around the clock responsive repairs and maintenance service ("the Service"). Because of their size and the fact that they are subject to public procurement competition law, it was necessary for them to advertise the contract in the Official Journal of the European Union, which they did under reference 2018S 079-177903. It was then necessary for them to consult lessees directly following the consultation procedure set out in Schedule 2 of the Service Charges (Consultation etc) Regulations 2003 ("the Consultation Regulations").

4. The Applicants' case is that they duly complied with these procedures directly, and the process resulted in the appointment of a firm called MD Building Services. The contract was to run until 2022.

The issue in this application

5. The Applicants have informed the Tribunal, and the lessees, that it became apparent that MD Building Services were not performing the contract adequately. By mutual agreement, it was decided to end the contract early with a termination date of 20 January 2020.

6. This left the Applicants without a contractor to carry out the Service. They had the option of course of running the process they had undertaken in 2018 again, but after taking further advice, they decided to use a different route to procure another contractor. The route selected was the use of an established framework agreement. These are set up essentially as an umbrella organisation by groups in a particular sector. The group chosen is called Fusion 21. The point of a framework organisation is that it is responsible for compliance with public procurement law; it deals with requirements to publish notices in the OJEU, it vets and evaluates contractors who wish to be awarded work under the framework under open criteria. This relieves the Applicants from the responsibility to undertake those responsibilities themselves. Fusion 21 itself was awarded a framework contract under reference 2018/S 194-438057.

7. Using this framework model for selecting a new contractor, Focus 21 have recommended that Axis Europe be appointed as the new contractor by what is known as direct award. The appointment has already been made. It commenced on 20 January 2020. Notice to that effect was given at https://www.contractsfinder.service.gov.uk/Notice/186c1d91-215c-4a0d-8a7b-74e47597cbe8 in order to comply with public procurement law.

8. However, it was still necessary for the Applicants to comply with the consultation requirement set out in section 20 of the Act because its new contract with Axis Europe is to last until 28 September 2022, and it is therefore a qualifying long term agreement on which consultation is required.

9. The Applicants' case is that they have indeed complied with the consultation requirements except in one small respect, by sending a letter to all lessees dated 27 December 2019. The letter gave notice of the proposal to appoint Axis Europe in place of MD Building Services. It gave the estimated turnover for the new contract. It confirmed that Axis Europe would take on all responsibilities under the previous contract from 20 January 2020 on the same terms and at the same price as in the previous contract. It invited written observations in relation to the proposal giving the name and address for sending those observations and requiring that the last day for receiving those observations would be Friday 17 January 2020.

10. This letter is what is known as the "notice of intention" in the Consultation Regulations. That notice must state the date on which the "relevant period" ends. The relevant period is defined in relation to a notice as the period of 30 days beginning with the date of the notice. As the notice was dated 27 December 2019, the relevant period does not end until 25 January 2020. In giving the date on which consultation responses had to be received as 17 January instead of 25 January, the Applicants have technically breached the consultation requirements contained in the Consultation Regulations.

11. A breach of the Consultation Regulations can be cured by the tribunal granting dispensation from some part of the consultation requirement – in other words making a decision that the Applicants need not follow the precise requirements of the Regulations.

12. That is the order that the Applicants seek from the tribunal in this application.

Law

13. Section 20ZA in the Act provides the tribunal with the authority to dispense with consultation.

14. The wording of section 20ZA(1) is as follows:

"(1) 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 long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

15. The Tribunal's role in an application under section 20ZA is therefore not to decide whether it would be reasonable to enter into the long-term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

16. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

17. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

> "The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered."

The Respondents' views

18. In the consultation started on 27 December 2019, two responses from lessees were received. Both raised entirely legitimate queries, but neither response suggested the Applicants' adopt any different course from that which they have in fact followed.

19. All lessees have been notified of this application, and all have received a copy of the directions of Mr Ward dated 29 June 2020 in which he directed that any Respondent who wished to submit comments or representations, or to take an active part in the case, should contact the tribunal by 31 July 2020

and provide a written statement of case by 28 August 2020. None have contacted the tribunal.

Decision

20. In our view no lessee is likely to have suffered any prejudice as a result of the shortening of the consultation period from 25 January 2020 to 17 January 2020. None have suggested this possibility.

21. In these circumstances we grant the dispensation requested and so determine that compliance with the requirement to give 30 days notice of intention is dispensed with.

Appeal

22. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)