FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UM/LDC/2020/0101
Property	**:**	586 Properties in Woking
Applicant	**:**	Woking Borough Council
Representative	**:**	Mr M Thorowgood, counsel
Respondent	**:**	See attached Schedule
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(s)	**:**	Judge D R Whitney
Date of Hearing	**:**	30th March 2021
Date of Determination	**:**	22nd April 2021

DECISION

Summary of the Decision

1. **The Applicant is granted 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 in respect of placing of long term insurance contracts on 1st April 2015 and 1st April 2020. The dispensation is conditional upon the Applicant not looking to recover any of its costs of making this application from the Applicants long residential leaseholders as a service charge item. The Tribunal has made no determination on whether the costs of the works are reasonable or payable**.

The application and the history of the case

2. The Applicants applied for 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. The application sought dispensation from consultation in respect of two long term qualifying agreements entered into for the purposes of insuring the Applicants portfolio of properties let on a long residential lease. The contracts entered into were dated 1st April 2015 and 1st April 2020.

3. The Tribunal gave Directions on 18th December 2020, explaining that the only issue for the Tribunal is whether, or not, it is reasonable to dispense with the statutory consultation requirements and is not the question of whether any service charge costs are reasonable or payable.

4. The Directions provided that any party who objects should complete a pro forma which was attached to the same. Only those parties who objected would remain listed as a Respondent. Those parties who objected are listed as Respondents in the schedule to this application.

5. Subsequently further Directions were issued and the matter was listed for hearing. A bundle was supplied and references in [] are to pages within that bundle.

6. Although the original directions considered the matter suitable for determination on paper Mr and Mrs Gee [66 & 67] and Mr Keen [50] requested that the matter be determined orally. A hearing was fixed which took place by CVP remote video hearing.

The Law

7. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations provide that where the lessor enters into a qualifying long term agreement with a cost of more than £100 per lease

in any one service charge year the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum unless the required consultations have been undertaken or the requirement has been dispensed with by the Tribunal. An application may be made retrospectively.

8. Section 20ZA provides that on an application to dispense with any or all of the consultation requirements, the Tribunal may make a determination granting such dispensation "if satisfied that it is reasonable to dispense with the requirements".

9. The appropriate approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of *Daejan Investment Limited v Benson et al* [2013] UKSC 14.

10. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

11. The factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it. The Tribunal should be sympathetic to the lessee(s).

12. Where the extent, quality and cost of the works were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

> "I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be- i.e. as if the requirements had been complied with."

13. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the Lessee will be or has been caused relevant prejudice by a failure of the Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted.

14. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

15. If dispensation is granted, that may be on terms.

16. The effect of Daejan has been considered by the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177

(LC), although that decision primarily dealt with the imposition of conditions when granting dispensation and that the ability of lessees to challenge the reasonableness of service charges claimed was not an answer to an argument of prejudice arising from a failure to consult.

Hearing

17. The hearing was attended by Mr Thorowgood of counsel and Ms Francis solicitor for the Applicant. Ms Lisa Harrington, Senior Health and Safety Officer attended and gave evidence for the Applicant.

18. Mr Clive Mintram and Dr Sarah Davie attended as Respondents. No other Respondents were in attendance.

19. Counsel for the Applicant had filed in advance a skeleton argument. Counsel relied upon the *Daejan* case and attached a copy of the authority. It transpired during the hearing an email sent by Dr Davie, being her objection, dated 27th January 2021 was not within the bundle. This was forwarded to me by the tribunal case officer during the hearing.

20. At the start of the hearing Mr Mintram confirmed he had sold his leasehold interest in his property with the sale completing on 12th March 2021. He continued to object on the basis that he had paid certain of the costs being the subject matter of the dispute.

21. Mr Thorowgood called Ms Harrington to give evidence. She relied on her witness statement [117-123]. She confirmed the same was true and accurate to the best of her knowledge and belief.

22. In supplementary questioning Ms Harrington explained how the Council relied on brokers, Arthur J Gallaher to test the market. When the last agreement ended in 2020 they went to tender and received 4 bids. The brokers produced a report and recommended an Insurer Ocaso SA [99]. The report assessed each of the bids and the merits of the same and scored each [116]. Ocaso SA had the highest score. Their tender was also the cheapest. The scoring was weighted in favour of price but also took account of other factors including service and the financial strength of the company.

23. Ms Harrington explained that in respect of the 2015 insurance contract Arthur J Gallaher were the brokers used by the Council. She confirmed they undertook a similar exercise to determine the best insurance quote available. Under that exercise the insurer chosen was Aspen Insurance.

24. In both instances the polices were for 3 years initially and could be extended to 5 years. The Aspen policy had been extended and ran for a 5 year term.

25. Ms Harrington confirmed the Council had in the past used other brokers and she referred to AON. She felt it was good to remain with a

broker so that they know what your requirements are. Ms Harrington confirmed the Council do not receive any commission for placing the policy.

26. In cross examination Mr Mintram asked why the Council moved to a long term agreement. Ms Harrington stated she did not believe the Council had used annual policies in the last 22 years.

27. Dr Davie then cross examined.

28. Ms Harrington explained that the Council takes out one policy for all its properties as this provides advantages in terms of economies of scale. The costs of administering many policies would be higher. Ms Harrington confirmed that there is a separate policy for the Councils own housing stock not let on long residential leases. In respect of that policy there is a £10,000 excess which is far higher than that on the leaseholder policy being considered within this application.

29. On re-examination Ms Harrington was asked in respect of certain quotes produced by Mr Mintram [48 & 49] from AVIVA and Admiral. Ms Harrington said without a full schedule and policy terms she could not be sure that these were like for like. She explained that the Council policy includes terrorism and accidental damage. In her opinion every additional feature is charged for.

30. Mr Mintram spoke to his objection and documents [38-49]. He explained he obtained quotes for his property which were considerably cheaper. He did not believe Woking had been transparent. He referred to a previous application for dispensation whereby Woking had agreed to hold consultation meetings but in his evidence this had not happened. He was concerned that the insurer appeared to be a non UK company.

31. He explained he obtained his quotes via Go Compare using the rebuild costs. He had not been able to find a policy in joint names but assumed the policy covered all that would reasonably be required.

32. Mr Mintram invited the Tribunal to refuse the application.

33. Mr Thorowgood cross examined Mr Mintram.

34. Mr Mintram accepted that the letters from Woking, for example [40] were reasonably informative but as Mr Mintram stated he was not an insurance clerk. He considered the costs very high. He stated as a householder he would not have opted for terrorism cover.

35. Mr Mintaram accepted that on his second request direct to Ms Harrington she had promptly provided the policy.

36. Dr Davie relied upon her email objection dated 27th January 2021. This was not within the bundle but it was accepted it was sent to the Tribunal and the Council.

37. Dr Davie explained her primary issue was less about the price but the fact that the leaseholders had been excluded from having any say over the placing of the policy. Dr Davie was concerned that as a leaseholder she could not simply have insurance for her block. She felt if better communication all could have been avoided particularly since the new policy led to a substantial increase in the premium. She referred to her block where the premium rose from £140 under the 2015 agreement to £230 under the 2020 agreement. She felt some leaseholders would struggle with such an increase without any prior warning as to the same.

38. Dr Davie was pleased to note Woking were taking all of their maintenance obligations back in house and were stopping using an external managing agent.

39. Dr Davie also invited the Tribunal to dismiss the application outright. She was concerned that conditions would not be appropriate. She had spoken to Mr Mintram and heard what he had to say re Woking previously agreeing to hold consultation meetings and then not doing so. Further she was surprised that Woking had not known or realised they should have consulted over these two contracts.

40. Mr Thorowgood cross examined Dr Davie.

41. Dr Davie explained she could not say if the outcome would have been different if a consultation had taken place. She accepted it might not have been. It is only through this application that she had learnt much of what had gone on and why. She agreed that the use of a broker was appropriate who would recommend a policy. She said that is what she does for her car insurance.

42. As a general comment Dr Davie felt the Tribunal process and directions had been complicated and she was concerned leaseholders in receiving the first set of directions did not understand what was required. She felt the system of directions employed by the Tribunal should be simplified.

43. Mr Thorowgood explained the *Daejan* decision that he relied upon in some detail at the prompting of the Tribunal so that the Respondents in attendance were aware of the law the Tribunal had to consider.

44. Mr Thorowgood relied upon his skeleton argument. He explained that Woking had done what it could to get the best deal for leaseholders. In his submission even if there had been consultation then the Council could not practically have done anything different. They went to a broker to put the matter out for tender, obtained 4 quotes, took advice as to the best policy and proceeded in accordance with that advice. On

both occasion before the Tribunal today the price proceeded with was the cheapest although clearly within the brokers report other matters had also been considered.

45. Mr Thorowgood pointed out that out of the total number of properties (586) only a very small number had objected, 15. In his submission whilst he noted the comments of Dr Davie he submitted that there were not barriers to leaseholders objecting if that is what they wished to do so.

46. He submitted none of the objectors had suggested any conditions should be attached. He suggested Woking had been candid in admitting they had not consulted and now realised they should have done so.

47. At the conclusion of the hearing the Tribunal checked with all parties that they had opportunity to say anything they wished. All confirmed they had.

Decision

48. The Tribunal thanks all the participants in this hearing for their helpful and measured submissions which were helpful to the Tribunal in determining this matter. The Tribunal has had regard to all oral submissions and evidence, the documents within the bundle, Dr Davie's objection and the skeleton argument of the Applicant's counsel.

49. I have considered the points raised by Dr Davie as to her concerns over the directions. I will bring these to the attention of the Regional Judge to consider if any amendments should be made.

50. I have considered carefully all of the documents provided. The Council for both contracts used a third party independent broker. On each occasion the broker went to the insurance market and obtained four quotes. These quotes were then considered and a recommendation issued. The reports [78-88 and 89-116] set out the tests undertaken by the brokers and their findings.

51. Whilst I am surprised the Council had not previously realised their need to consult they have been candid in their admission as to the failings. They have now bought this matter to the Tribunal to seek the statutory dispensation. Dr Davie and Mr Mintram set out their objections in very clear terms. Mr Mintram had gone to the trouble of obtaining alternative quotes.

52. Turning to the alternative quotes it is clear Mr Mintram did the very best he could but as he accepted these may not be like for like quotations. They were on what he believed to be normal market terms but full details were not available. Both he and Dr Davie raised their concerns that effectively leaseholders had been excluded from any

involvement in the process. Neither felt any conditions were appropriate to overcome any prejudice which may have been caused by the failure to consult.

53. I considered the points raised by the Respondents (not just those who attended) but I am not satisfied that they have demonstrated any real prejudice which would justify refusal of the application having regard to the test in *Daejan*. The Councils approach was such that the market on each occasion was tested. Whilst price is very important the assessment also took account of other factors. In actual fact each contract was awarded to the cheapest quotation provided. In my opinion this process was a fair and arms length procedure on the evidence.

54. No Respondent suggested any conditions which may be attached to the granting of any dispensation. I have however had regard myself to what if any conditions should be attached.

55. In my judgment it is just and equitable to grant dispensation on the facts of this case subject to a condition that Woking Council do not look to recover any of the costs incurred in making this application from any of their leaseholders as a service charge cost.

56. For completeness I confirm in making this determination I make no findings as to the liability to pay or the reasonableness of the insurance premium and any management charges levied by the Applicant.

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 to the First-tier Tribunal at rpsouthern@justice.gov.uk being 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