



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

Case reference : **LON/00BK/LDC/2021/0163**

HMCTS code (paper, video, audio) : **V: CVPREMOTE**

Properties : **Various properties at Scottish Towers W9, Torricon House NW6, 108-132 Westbourne Terrace W2 and Avenue Gardens Estate W10**

Applicant : **Westminster City Council**

Representative : **Mr Ranjit Bhowse QC**

Respondents : **Various long leaseholders (as set out in a list attached to the application)**

Type of Application : **Dispensation with statutory consultation requirements under s.20ZA Landlord & Tenant Act 1985**

Tribunal member(s) : **Judge Nicola Rushton QC, Mrs Sarah Redmond MRICS**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of hearing : **15 September 2021**

Date of decision : **16 September 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to or not objected to by the parties. The form of remote hearing was CVPREMOTE. A

face-to-face hearing was not held because no-one requested the same and all issues could be determined in a remote hearing. The documents to which the tribunal were referred were in a bundle of 185 pages, plus copies of sample leases, the contents of which have been considered by the tribunal.

Decision of the tribunal

- (1) Dispensation is granted pursuant to section 20ZA of the Landlord & Tenant Act 1985, subject to the condition that the Applicant is not to add the costs of and occasioned by this Application to any of the Respondents' service charges but is to bear them itself.

The application

1. The Applicant, Westminster City Council ("**Westminster**"), is the freeholder and landlord in respect of 365 properties at variously Scottish Towers W9, Torrison House NW6, 108-132 Westbourne Terrace W2 and Avenue Gardens Estate W10 ("**the Properties**"). The Applicant's case is set out in a Statement of Case prepared by Mr Ranjit Bhowe QC (and updated on 23 August 2021 by Mr Andrew Pye, Case Management Officer at Westminster).
2. The Respondents are the long leaseholders of the Properties, as identified in a list submitted to the tribunal with the application, and which the tribunal has seen. The tribunal understands that the other flats in the said blocks are not held under long leases and so the tenants of those flats have no interest in this application.
3. Copies of three leases were included with the tribunal's papers. Two are samples of the two main types of lease held by the Respondents. The first type, issued up to 1987, does not include provision for improvements (the sample is Flat 9, Willow House, dated 1984). The second, issued from 1987, does allow for improvements (the sample is Flat 9, Elm House). The third lease is a part owned/part rent lease relating to 20 Torrison House and dating from 1994, of which the tribunal understands there are few if any other examples among the Properties. All the sample leases include provision for the payment by the leaseholder of service charges for among other things repair and maintenance works, and (except for the first type of lease), improvement works, carried out by Westminster.
4. The Applicant seeks dispensation under Section 20ZA of the Landlord & Tenant Act 1985 ("**the Act**") in respect of statutory consultation requirements under Schedule 2 to the Service Charges (Consultation Requirements) (England) Regulations 2003 ("**the Regulations**"), in relation to the entry by it into a qualifying long-term agreement ("**QLTA**") with United Living (South) Limited ("**ULSL**") dated 13 April 2018 ("**the ULSL Agreement**").

5. The Applicant proposes to engage ULSL to carry out “qualifying works” to buildings which include some or more of the Properties, under the terms of the ULSL Agreement. The application relates solely to its decision in principle to use ULSL and to apply the ULSL Agreement to future works at the Properties, given that the Respondents were not consulted about the Applicant’s original decision to enter into the ULSL Agreement with ULSL. The Applicant intends to engage separately in statutory consultation with relevant Respondents in relation to any specific proposed scheme of works.
6. The only issue is whether it is reasonable to dispense with the statutory consultation requirements. In particular, the application does not concern the issue of whether any service charge costs will be reasonable or payable.

The hearing

7. The hearing took place on 15 September 2021 by remote video platform (CVP). Mr Bhowse represented the Applicant. It was also attended by the following from Westminster: Mr Pye, Mr Ibrahim Youseff (Leasehold Advisor) and Mr Paul Halpin (Interim Service Transition Manager).
8. There was no attendance from any of the Respondents nor from any person representing them. No Respondent has filed any formal Reply with the tribunal objecting to the application. As set out below, the tribunal is satisfied that the Respondent leaseholders have been properly served with the application and given notice of the hearing, and that there are therefore no objections to this application.
9. The tribunal heard oral submissions from Mr Bhowse on behalf of the Applicant, and he also answered questions from the tribunal. The tribunal has also carefully considered all of the papers in the bundle.

Procedural matters

10. The application was received by the tribunal on 22 June 2021. Directions were issued by Judge Silverman on 5 July 2021.
11. Those directions among other things required the Applicant (a) by 20 July 2021 to send each of the leaseholders by email, hand delivery or first class post: copies of the application form (excluding the list of Respondents), and the directions; (b) to display a copy of the application and the directions in a prominent place in the common parts of the Properties and (c) by 27 July 2021 to send an email to the tribunal confirming these things had been done and stating the date when they were done.

12. The directions included the date of the final hearing on 15 September 2021 and provided that any leaseholder who opposed the application should by 3 August 2021 complete and send to the tribunal the attached Reply Form, together with a statement in response and any copy documents.
13. The directions state expressly that the application only concerns whether it is reasonable to dispense with the statutory consultation requirements and that it does not concern the issue of whether any service charge costs resulting from the works are reasonable or payable.
14. On 22 July 2021 My Pye emailed the tribunal confirming that (a) a copy of the application and directions were sent by first class mail to all the Respondents on 16 July 2021; and (b) copies of the application and directions were displayed in the common parts of the Properties on 16 July 2021, except for Torridon House, where they were displayed on 20 July 2021.
15. The bundle included notes of 9 contacts by email or telephone received by Mr Pye from leaseholders between 19 July and 6 August 2021, after service of those documents, mainly enquiring about the nature and purpose of the application. For each call Mr Pye recorded that he explained the purpose of the application and the procedure to make an objection and that the leaseholder was satisfied with that explanation. For the emails, he included a copy of the email and his response answering the queries raised. As already noted, no responses and no objections have been submitted by the Respondents.
16. The tribunal is accordingly satisfied that the Respondents have been served with the relevant papers and that there are no objections to this application.

The basis of the application

17. The background to the application is that in 2016 the Applicant proposed to enter into two 10-year QLTAs with building contractors for carrying out major works to its housing stock across the borough. The borough was divided into two areas for this purpose: one contract was in relation to the North/West area and the other to the South area. The Applicant wished to use two contractors so that if one contract terminated, the other contractor could act as a back-up, and for benchmarking reasons.
18. The Applicant therefore embarked on a consultation process under Schedule 2 to the Regulations (pursuant to Regulation 5(2)), these being QLTAs for which public notice was required, since they were covered by European Union public procurement rules. Phase One of that consultation process involved the Applicant giving notice of its

intention to enter into any such QLTAs, prior to tendering and so before any particular contractor was identified. Such notice had to be given to all long leaseholders throughout the borough, in accordance with paragraphs 1 to 3 of Schedule 2, which the Applicant did by notices issued and sent on about 3 May 2016.

19. The tribunal was told that 8,990 such leaseholders were consulted and that the Applicant received 101 observations in response, from 44 leaseholders (pursuant to paragraph 1(2)(e) and (f) of Schedule 2).
20. The bundle includes a copy of a sample notice, and of all of the observations received, together with the Applicant's responses to them as prepared by James Portsmouth, Lessee Services Manager at Westminster. It is apparent that these included observations from leaseholders in the North, West and South areas.
21. The Applicant undertook one procurement exercise for both areas. From 20 contractors who expressed an interest, the Applicant selected 7 to whom tenders were issued, all of whom submitted bids for both areas. The tribunal was told that the evaluation criteria were based on 50% for price and 50% for quality.
22. The contractor which scored the highest in its bids, in relation to both North/West and South, was ULSL. It was therefore selected as the contractor for the South area, this being the larger contract. The contractor which scored second highest in both bids was Axis Europe plc ("**Axis**"). Axis was therefore selected for the North/West area.
23. The Applicant then undertook Phase Two of its consultation process, which was to consult the leaseholders in the South area in relation to the award of the South contract to ULSL, and to consult those in the North/West area in relation to the award of that contract to Axis. Both consultations were in essentially identical terms except for the identity of the contractor. Two proposals, one for each contract, were prepared by the Applicant pursuant to paragraph 4 of Schedule 2. Notices setting out the proposed award of the contract to ULSL were then sent to leaseholders in the South area and notices regarding the proposed award of the contract to Axis were sent to leaseholders in the North/West area. Samples of both notices are in the bundle, both being dated 14 August 2017 (although it appears they were sent on 21 August 2017).
24. The bundle also includes all the observations received from leaseholders in the Phase Two consultation. While these covered a wide range of matters, none specifically objected to the selection of ULSL, for the South area.

25. Following completion of the consultation process, the Applicant entered into a 10-year contract with Axis in relation to the North/West area on 21 February 2018 and with ULSL in relation to the South area on 13 April 2018. Both contracts include provision for the contractor to carry out building works in relation to the other area if necessary, as a back-up. Since then, both contractors have carried out qualifying works projects.
26. However, on 14 October 2020 Axis gave notice to terminate its agreement with effect from 20 August 2022, which was accepted by the Applicant on the basis Axis would complete existing projects but not start any new ones. The Applicant therefore needed a contractor to undertake future projects in the North/West area, and ULSL agreed to undertake these, in accordance with the terms of its existing ULSL Agreement.
27. On 16 December 2020 the Applicant then wrote to all the leaseholders in the North/West area informing them that Axis had given notice to terminate, and explaining that it was proposed that ULSL be appointed to carry out works which Axis would have done, under ULSL's existing 10-year agreement with the Applicant. Observations were invited within 37 days. Copies of those observations were also in the bundle, including two from leaseholders who are Respondents to the present application. One of those, from the occupant of 62 Falkirk House simply requested a copy of the proposal documents, which were supplied. The other, from the occupant of 6 Fir House, related to specific proposed works at their property and so is not relevant for the purposes of the present application. No observations were received from any leaseholder which objected to ULSL per se.
28. The tribunal was told that in the event, Axis has now withdrawn its notice of termination, with the agreement of the Applicant, but the Applicant wishes ULSL to continue with certain projects where preparatory discussions have already started. Those projects relate to the four estates/areas which are the subject of the present application, and the tribunal was told in very general terms of the type of works planned.
29. The position therefore is that the Respondents, who are leaseholders of properties within the North/West area, were not consulted during Phase Two on the award of the ULSL Agreement to ULSL, because that agreement was intended to relate to the South area. Hence this application for dispensation is required if ULSL is to undertake any qualifying works to the Respondents' Properties, under the ULSL Agreement.
30. The dispensation requested relates only to the use of ULSL and the application of the ULSL Agreement – separate consultation will still

need to be carried out in relation to the specific qualifying works proposed to the Respondents' Properties.

The law

31. Section 20ZA of the Act, subsection (1) provides as follows:

'Where an application is made to a 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.'

32. The Supreme Court in the case of *Daejan Investments v Benson and others* [2013] UKSC 14 set out certain principles relevant to section 20ZA. Lord Neuberger, having clarified that the purpose of sections 19 to 20ZA of the Act was to ensure that tenants are protected from paying for inappropriate works and paying more than would be appropriate, went on to state *'it seems to me that the issue on which the [tribunal] should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements'*.

33. The discretion is not a binary one: the tribunal may grant dispensation unconditionally or on conditions (*Daejan* at [54]).

34. Mr Bhowse accepts that the legal burden of proof on such an application is on the landlord. However, he says, there is an evidential burden on the Respondents to identify any "relevant prejudice". He relies in this regard on Lord Neuberger's statement in *Daejan* at [69] that *"...the tenants' complaint will normally be, as in this case, that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it."*

35. In this case, because no objections have been received from any Respondent, either formally through the tribunal process or informally, it is said in effect that prejudice has not been put in issue.

36. For that reason and in any case, the Applicant submits that none of the Respondents have or will suffer any prejudice, including in the sense determined in *Daejan*, from the omission to consult them on the original entry into the ULSL Agreement in 2018.

Findings

37. The tribunal is satisfied, on the basis of the evidence in the bundle and the submissions on behalf of the Applicant, that the Respondents have not suffered any prejudice, in the sense required on this application according to *Daejan*, from the fact that the Applicant did not consult them before entering into the ULSL Agreement. The tribunal has reached this conclusion for the following reasons:
- (i) No Respondent has raised any objection within these proceedings alleging any prejudice, the tribunal being satisfied that the Respondents have had a proper opportunity to do so;
 - (ii) No Respondent responded to the consultation carried out in December 2020 by the Applicant by objecting to the appointment of ULSL or raising any issue in relation to their appointment per se;
 - (iii) ULSL's bid was scored the highest for both the North/West and South areas, and higher than Axis who was awarded the North/West contract. It would therefore have been appropriate for the Phase Two consultation to have proceeded on the basis of an award of the North/West contract to ULSL, and ultimately for ULSL to have been awarded that contract originally, in terms of the content of their bid; and,
 - (iv) From the observations received during the Phase Two consultations from leaseholders in both the North/West and South areas, there is no reason to think that if the leaseholders in the North/West area had been asked for their observations on the award of the contract to ULSL, any matter would have been raised which would have led to that contract not being so awarded.
38. The tribunal agrees with Mr Bhole that the Applicant should meet the costs of and occasioned by this dispensation application, since it has only been necessary because the Applicant did not originally consult the leaseholders in North/West on the award of the ULSL Agreement to ULSL. It does not consider that there are any grounds for imposing any other conditions.

Determination

39. Accordingly the tribunal considers it reasonable to dispense with consultation requirements. Dispensation is granted pursuant to section 20ZA of the Landlord & Tenant Act 1985, subject to the condition that the Applicant is not to add the costs of and occasioned by this

Application to any of the Respondents' service charges but is to bear them itself.

40. This decision does not affect the tribunal's jurisdiction upon any future application to make a determination under section 27A of the Act as to the reasonableness and standard of any qualifying works undertaken under the ULSL Agreement and/or whether any service charge costs are reasonable and payable.

Name: Judge N Rushton QC

Date: 16 September 2021

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).