



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

Case Reference : CHI/19UJ/LDC/2022/0051

Property : Foylebank Court, Foylebank Way,
Castletown, Portland, Dorset, DT5 1BA

Applicant : Housing 21

Representative : -

Respondent : The Lessees

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 J Dobson

Date of Directions : 5th October 2022

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 major works, being the installation of an Appello Smart Living Solutions digital emergency call system. 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 Applicant applied by application dated 24th May 2022 for dispensation under Section 20ZA of the Landlord and Tenant Act 1985 (“the Act”) from the consultation requirements imposed by Section 20 of the Act.
3. The Tribunal gave Directions on 8th July 2022, 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. The Directions Order listed the steps to be taken by the parties in preparation for the determination of the dispute, if any.
4. The Directions further stated that Tribunal would determine the application on the papers received unless a party objected in writing to the Tribunal within 14 days of the date of receipt of the directions. None did. Having considered the application further and prior to undertaking this determination, the Tribunal is satisfied that a determination on the papers remains appropriate.
5. This the Decision made on that basis and following a paper determination.

The Law

6. Section 20 of the Landlord and Tenant Act 1985 (“the Act”) and the related Regulations provide that where the lessor undertakes qualifying works with a cost of more than £250 per lease 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.
7. 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”.

8. 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.
9. 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”.
10. 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).
11. 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.”
12. 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.
13. 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.
14. If dispensation is granted, that may be on terms.
15. There have been subsequent decisions of the higher courts and tribunals of assistance in the application of the decision in *Daejan* but none are relied upon or therefore require specific mention in this Decision.

Consideration

16. It is said in the application that the Property, consists of 11 leasehold dwellings, in respect of which the relevant provisions apply but also 37 rented properties, not relevant for these purposes. Further, all the leasehold properties are shared ownership and where the leases were originally granted on a term of 125- years.

17. The Applicant explains the position at some length in the application and as set out in the Directions dated 8th July. In essence it is said that there is a need to move away from an analogue emergency call system and that there is a limited number of other digital systems that offer general functionality comparable to the old analogue systems but have limited essential health and safety features in comparison to the Appello system. The reason why dispensation from consultation requirements is said to be required is that the Appello system is the only system on the market that uses end to end Transport Layer Security (TLS 1.2 or 1.3) encryption for all voice and data traffic and that at this stage of delivering the digital upgrade, the Applicant is unable to tender a directly comparable system as Appello are the only supplier a digital solution with the required functionality.

18. The Lease of 1 Foylebank Way commencing 10th March 2006 has been provided with the application (“the Lease”). The Tribunal understands that the leases of the other Flats are in the same or substantively the same terms. In the absence of any indication that the terms of any other of the leases differ in any material manner, the Tribunal has considered the Lease.

19. The Lessor has various obligations under the Lease, including at 5(5) that:

- 5(5) The Landlord will provide the following services:
- (a) employ a non-resident manager for the general supervision of the Estate
 - (b) arrange for the answering of emergency calls
 - (c) arrange for night staff cover
 - (d) the Communal Facilities”

.....

- (b) “the Landlord may add to diminish modify or alter any such service if by reason of any change of circumstances during the term such addition diminution or alteration is in the opinion of the Landlord reasonably necessary or desirable in the interest of good estate management or for the benefit of the occupiers of the Building”

20. The Lease continues at 7(5) as follows:

“7(5) The relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably incurred by the Landlord in connection with the repair management maintenance and provision of services for the Building and shall include (without prejudice to the generality of the foregoing)

- 7(5) (a) the costs of and incidental to the performance of the Landlord's covenants contained in clauses 5(2), 5(3), 5(4) & 5(5).

.....

7(5) (e) All other reasonable and proper expenses (if any) incurred by the Landlord in about the maintenance and proper and convenient management and running of the Estate including in particular any improvement to the Estate or services that the Landlord in its absolute discretion thinks will be of benefit to the Estate and the Leaseholders and other occupiers of the Estate

21. Accordingly, it is at least arguable that the works fall within the responsibility of the Applicant and are chargeable as service charges.
22. There has been no response from any of the Lessees opposing the application.
23. None of the Lessees have therefore asserted that any prejudice has been caused to them. The Tribunal finds that nothing different would be done or achieved in the event of a full consultation with the Lessees, except for the potential delay and potential problems.
24. Accordingly, the Tribunal finds that the Respondents have not suffered any prejudice by the failure of the Applicant to follow the full consultation process.
25. The Tribunal consequently finds that it is reasonable to dispense with all of the formal consultation requirements in respect of the major works to the building.
26. This decision is confined to determination of the issue of dispensation from the consultation requirements in respect of the qualifying long-term agreement. 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, then a separate application under section 27A of the Landlord and Tenant Act 1985 would have to be made.

ANNEX - RIGHTS OF APPEAL

- 1) 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 date this decision is sent to the parties.
- 2) 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.
- 3) The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
- 4) Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.