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

**Case reference** : **LON/00AW/LDC/2014/0003**

**Property** : **13-15 Chesham Street, London  
Sw1X 8ND**

**Applicant** : **N&D Property Trust Ltd**

**Representative** : **D&G Block Management Ltd**

**Respondent** : **The long –leaseholders of 13 -15  
Chesham Street**

**Representative** : **None**

**Type of application** : **Section 20ZA Landlord and Tenant  
Act 1985- To dispense with the  
requirement to consult  
leaseholders about the works to  
replace boilers.**

**Tribunal member(s)** : **Judge: N Haria LLB (Hons)  
Valuer: I Thompson BSc FRICS**

**Date of decision** : **19 March 2014**

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**DECISION**

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### **Decisions of the Tribunal:**

**Boiler one:** The Tribunal grants an order dispensing with the consultation requirements imposed under s.20 of the Landlord and Tenant Act 1985 in respect of the installation of a new boiler with works connecting the existing pipe-work, primary heating and circulation pumps as well as the installation of a new flue already carried.

**Boiler two:** In relation to the remaining works for the replacement of a second boiler and any associated works the tribunal does not grant an order for dispensation.

### **The application:**

1. The applicant seeks an order pursuant to s.20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for a dispensation of the consultation requirements imposed under s.20 of the 1985 Act and set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (the "2003 Regulations") in respect of the replacement of two communal gas fired boilers and associated works at the property.

### **Hearing**

2. The parties did not request a hearing and so the application was decided by the Tribunal on the papers alone.

### **Background:**

3. The Premises is a period conversion block containing 13 flats.
4. The Applicant is the landlord and is represented by the managing agent of the block.
5. The property is serviced by two communal gas fired boilers providing heating and hot water to ten of the thirteen flats within the block. The remaining three flats contribute towards the boilers by way of a service charge but they have their own independent heating system. Both boilers are approximately twelve years old. The boilers are set up so that if one boiler malfunctions the other takes over control of the services.
6. The Managing Agent claims that despite several repairs to boiler one ("boiler one") it continued to break down and left the residents without heating and hot water over the Christmas period until it was eventually replaced in January 2014.

7. The Managing Agent claims that the second boiler (“boiler two”) also requires replacement as it has not been replaced since it previously encountered problems and was decommissioned. The Applicant intends to replace the boiler two and states that a Notice of Intention in relation to these works has been served on the leaseholders. The Tribunal was sent a copy of a Notice of Intention dated 24.01.14 with the representations received from Mr Mills – Owens (although the Applicant’s statement of case states that a copy is produced, there was no copy of the Notice of Intention in the papers submitted by the Applicant).

**Directions:**

8. The Tribunal issued Directions in the matter on the 13.01.2014 and the matter was set down for a decision in the week commencing 17.03.2014.

**Inspection:**

9. The Directions issued did not provide for an inspection of the Premises and no request for an inspection was made by either party.

**The Applicant’s Case:**

10. The Applicant’s case is fully set out in the Applicant’s statement of case.
11. The Applicant has produced a copy of a sample lease.
12. The Applicant submits that between the periods from the 24.09.13 and 10.01.14 there were several occasions when boiler one had broken down and was out of action as detailed in the statement of case [9] despite the boiler having been serviced by Cleanheat Ltd on the 10.09.13 when no issues with the boiler were flagged.
13. On the 9 October 2013 the Managing Agent wrote to the leaseholders informing them of the problems with boiler one and seeking their consent to forgo the statutory consultation process so that they could instruct a contractor to commence the installation of a new boiler. The letter informed the leaseholders that a suitable Mechanical and Electrical Surveyor had been instructed to oversee the work and provide a condition survey and that a number of quotations had been arranged for the repair or replacement of the boiler with a view to commencing the work immediately after the quotes had been received.
14. On the 17 October 2013 Mr Chris Steward of Steward Associates Limited undertook a condition survey and on the 6 November he produced a paper setting out the options for the repair and/or replacement of the boiler. The Applicant decided to take option 1 as it provided an immediate solution with the least disruption to residents.

15. On the 14 November 2013 the Managing Agent obtained a list of faults with the boiler from the company who had been maintaining the boiler.
16. The Managing Agent has arranged to obtain quotations for the works from a number of contractors.
17. On the 02.01.14 the Applicant issued an instruction for boiler one to be replaced and the work was carried out in the period from 09.01.14 to 10.01.14.

**The Respondent's Case:**

18. Six out of the thirteen leaseholders have consented to the grant of retrospective dispensation of the consultation requirements under Section 20 1985 Act and to commence the replacement of boiler one and the associated equipment and works.
19. The leaseholder of Flat 4, Mr Mills- Owens has objected to the grant of dispensation and has submitted written representations in support.
20. In relation to boiler one Mr Mills – Owens states that prudent management would dictate that boilers are serviced in the summer months to ensure they are in proper working order for the winter and that they should be insured against breakdown. Mr Mills – Owens refers to the letter of the 9.10.13 from the Managing Agents requesting that the leaseholders forego the statutory consultation process, he contends that as the boiler was not replaced until the 10.01.14 and the works took no more than two days there was sufficient time between October 2013 and January 2014 for a full consultation of the leaseholders.
21. Mr Mills – Owens states that as a result of the lack of consultation in respect of the replacement of boiler one the leaseholders do not have an independent assessment of what was wrong with the boiler and whether the replacement of the boiler was necessary. Mr Mills – Owens does acknowledge that the replacement boiler (a Valiant boiler) is of a good make which he considers to be practical, sensible and reasonable as it resulted in further pipe- work and its associated disturbance and expense unnecessary.
22. Mr Mills- Owens objects to the lack of consultation and also to the application for dispensation from the statutory consultation requirements in respect of boiler two. Mr Mills- Owens states that the Notice of Intention dated 24 January 2014 received by him contains insufficient information to enable him to make any comments on the proposed works as it does not include the details of any contractors or provide any quotations and gives no reason for the possible repositioning of the boiler.

23. The remaining leaseholders have not objected or submitted any representations.

**The Law:**

24. **s. 20** of the 1985 Act provides that:

*“(1) Where this section applies to any qualifying works....., the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—*

*(a) complied with in relation to the works or agreement, or  
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.”*

25. The effect of s.20 of the 1985 Act is that, the relevant contributions of tenants to service charges in respect of (inter alia) "qualifying works" are limited to an amount prescribed by the 2003 Regulations unless either the relevant consultation requirements have been complied with in relation to those works or the consultation requirements have been dispensed with in relation to the works by (or on appeal from) the tribunal.

26. "Qualifying works" are defined in s.20ZA of the 1985 Act as "works on a building or any other premises", and the amount to which contributions of tenants to service charges in respect of qualifying works is limited (in the absence of compliance with the consultation requirements or dispensation being given) is currently £250 per tenant by virtue of Regulation 6 of the 2003 Regulations.

27. **s. 20ZA** of the 1985 Act provides:

*“(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.”*

28. Under Section 20ZA(1) of the 1985 Act, "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 ... the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements". The basis on which this discretion is to be exercised is not specified.

29. The consultation requirements for qualifying works are set out in Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 as follows:-

### *Notice of intention*

- (1) The landlord shall give notice in writing of his intention to carry out qualifying works—
  - (a) to each tenant; and
  - (b) where a recognised tenants' association represents some or all of the tenants, to the association.
- (2) The notice shall—
  - (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
  - (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
  - (c) invite the making, in writing, of observations in relation to the proposed works; and
  - (d) specify—
    - (i) the address to which such observations may be sent;
    - (ii) that they must be delivered within the relevant period; and
    - (iii) the date on which the relevant period ends.
- (3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

### *Inspection of description of proposed works*

- (1) Where a notice under paragraph 1 specifies a place and hours for inspection—
  - (a) the place and hours so specified must be reasonable; and
  - (b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.
- (2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

### *Duty to have regard to observations in relation to proposed works*

Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

### *Estimates and response to observations*

- (1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.
- (2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.
- (3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is

made by a recognised tenants' association), the landlord shall try to obtain an estimate—

- (a) from the person who received the most nominations; or
- (b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or
- (c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

- (a) from at least one person nominated by a tenant; and
- (b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—

- (a) obtain estimates for the carrying out of the proposed works;
- (b) supply, free of charge, a statement (“the paragraph (b) statement”) setting out—
  - (i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and
  - (ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and
- (c) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord—

- (a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
- (b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
- (c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;
- (d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or
- (e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

- (9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—
- (a) each tenant; and
  - (b) the secretary of the recognised tenants' association (if any).
- (10) The landlord shall, by notice in writing to each tenant and the association (if any)—
- (a) specify the place and hours at which the estimates may be inspected;
  - (b) invite the making, in writing, of observations in relation to those estimates;
  - (c) specify—
    - (i) the address to which such observations may be sent;
    - (ii) that they must be delivered within the relevant period; and
    - (iii) the date on which the relevant period ends.
- (11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

*Duty to have regard to observations in relation to estimates*

Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

*Duty on entering into contract*

- (1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)—
- (a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and
  - (b) where he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.
- (2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.
- (3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

**The Tribunal's decision:**



30. The Supreme Court's decision in the case of Daejan Investments Ltd v Benson and Ors [2013] 1 W.L.R. 854 clarified the Tribunal's jurisdiction to dispense with the consultation requirements and the principles upon which that jurisdiction should be exercised.
31. The scheme of the provisions is designed to protect the interests of leaseholders, and whether it is reasonable to dispense with any particular requirements in an individual case must be considered in relation to the scheme of the provisions and its purpose. The purpose of the consultation requirements is to ensure that leaseholders are protected from paying for works which are not required or inappropriate, or from paying more than they would be reasonable in the circumstances.
32. The Tribunal needs to consider whether it is reasonable to dispense with the consultation. Bearing in mind the purpose for which the consultation requirements were imposed, the most important consideration being whether any prejudice has been suffered by any leaseholder as a consequence of the failure to consult in terms of a leaseholder's ability to make observations, nominate a contractor and or respond generally.
33. The burden is on the landlord in seeking a dispensation from the consultation requirements. However the factual burden of identifying some relevant prejudice is on the leaseholder opposing the application for dispensation. The leaseholders have an obligation to identify what prejudice they have suffered as a result of the lack of consultation.
34. The Tribunal having considered the evidence is satisfied that the works (both to boiler one and boiler two) are qualifying works to which the provisions of s. 20 of the 1985 Act and the 2003 Regulations apply. Insofar as the works that have already been carried out (the boiler one works) are concerned, the landlord has not complied with the consultation requirements set out in the 2003 Regulations.

**Boiler One:**

35. The Tribunal is satisfied that the replacement of the boiler, was of an urgent nature given that in the leaseholders who relied upon the heating and hot water from the communal boilers would otherwise have been without any heating and hot water. The Tribunal noted that although three of the leaseholders had their own independent boilers providing heating they still relied upon the communal boilers for the supply of hot water.
36. The Tribunal is satisfied that the replacement of the boiler was for the benefit of and in the interests of both landlord and leaseholders in the Property. The Tribunal noted that only one out of a total of 13 leaseholders had objected to the grant of dispensation and that 6 of the leaseholders supported the works and the grant of dispensation.

37. The Tribunal considered the reasons given by Mr Mills- Owens the leaseholder of Flat 4 objecting to the application. Mr Mills- Owens has complained about poor planning and management resulting in there being insufficient time to consult the leaseholders. The reasons given do not show any prejudice to the leaseholder. The Tribunal addressed its mind to any financial prejudice suffered by the leaseholders due to the failure to consult. The Tribunal noted that the Managing Agent had obtained an independent report as to options available and had obtained quotes from at least three independent contractors prior to letting the contract. Mr Mills- Owens representations do not show that the works would have cost any less if the statutory consultation had been complied with, and so the Tribunal is not persuaded that the leaseholders have suffered any financial prejudice as a result of the failure to consult.
38. The Tribunal has taken into consideration that the leaseholders have not had the full opportunity for consultation under the 2003 Regulations. However, the works were urgent and the Applicant has taken reasonable steps in the circumstances and time available, to provide the leaseholders with relevant information. The leaseholders did not have an opportunity to make observations and to comment on the replacement of the boiler or to nominate a contractor. The Managing Agents could have started the consultation process in October 2013 when it first wrote to the leaseholders regarding the proposal to replace the boiler. Instead the Managing Agents sought the agreement of the leaseholders to dispense with the consultation requirements and arranged for a report to be produced by a Mechanical Engineer to analyse the various options. It was only as a result of the boiler breaking down totally to the extent that a repair to the boiler would have been just as costly as a total replacement of the boiler that the Applicant instructed a contractor to replace the boiler. In view of the circumstances under which the replacement of the boiler became necessary the Tribunal does not consider that the leaseholders, in losing an opportunity to make observations and to comment on the replacement of the boiler or to nominate a contractor, suffered any relevant prejudice.
39. The Tribunal having considered the evidence is satisfied that it is reasonable to dispense with the consultation requirements in this case. In the circumstances, the Tribunal makes an order that the consultation requirements are dispensed with in respect of the replacement of boiler one and the associated works.

**Boiler Two:**

40. The Applicant has already served a Notice of Intention in respect of the replacement of boiler two. Since the Property is serviced by two boilers and boiler one has already been replaced, the Tribunal is not persuaded that the replacement of boiler two is sufficiently urgent as to make it reasonable to dispense with the consultation requirements.

41. The Tribunal noted the representations made by Mr Mills – Owens in respect of these works.
42. The Tribunal is of the view that the leaseholders should not be denied the opportunity to be fully consulted on the proposal to replace boiler two.
43. **It should be noted that in making its determination, this application does not concern the issue of whether any service charge costs are reasonable or indeed payable by the lessees. The Tribunal's determination is limited to this application for dispensation of consultation requirements under S20ZA of the Act.**

**Name:** N Haria

**Date:** 19 March 2014