



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

Case Reference : **BIR/44UC/LDC/2015/0003**

Property : **Dempster Court, Church Street, Nuneaton,
Warwickshire CV11 4AT**

Applicant : **Nuneaton & Bedworth Borough Council**

Respondents : **The Lessees of Dempster Court**

Type of Application : **An Application under Section 20ZA of the
Landlord & Tenant Act 1985 for
dispensation of the Section 20 consultation
requirements.**

Tribunal Members : **Mr Vernon Ward BSc (Hons) FRICS
Mr Paul Hawksworth Lawyer**

Date of Decision : **4 January 2016**

DECISION

Background.

1. The Application by Nuneaton & Bedworth Borough Council (“the Council”) requests the Tribunal to grant retrospective dispensation from the consultation requirements contained within section 20 of the Landlord and Tenant Act 1985 (“the 1985 Act”) and the Service Charge (Consultation Requirements) (England) Regulations 2003 (“the Regulations”) in respect of roof repairs to Properties at Dempster Court, Church Street, Nuneaton, Warwickshire CV11 4AT (“the Development”).
2. The Applicant is the freeholder of Dempster Court, whilst the Respondents are the Lessees of the Development, each holding long leases which are in broadly similar form, for the residue of a 125 year term from December 1982.
3. In July 2013, extensive works were carried out to the roof of the development with the final cost amounting to £155,269.80. These works were the subject of applications to the Tribunal under Section 27A of the 1985 Act.

Case references:

BIR/44UC/LSC/2014/0006;
BIR/44UC/LSC/2014/0008;
BIR/44UC/LSC/2014/0016.

4. In the Decision relating to those Applications (“the Section 27A Decision”), the Tribunal concluded that it was reasonable that the Respondent (which in those cases was the Council i.e. the Applicant in these proceedings) had carried out the works, and that the costs of the works would have been themselves reasonable had they carried out a full consultation procedure accordance with the Regulations. However, the Tribunal found that the consultation procedure was flawed, and accordingly, the Section 27A Decision was that the Applicant Leaseholders were not obliged to contribute more than £250 towards the cost of the works carried out as the triviality threshold applies. The Council has sought leave to appeal the Section 27A Decision which has yet to be considered by the Tribunal.
5. Following Directions issued by a Procedural Chairman, submissions from both parties were received and were copied to either side. Neither party requested an oral hearing.

The Submissions of the Parties

6. The Applicant sought dispensation on the basis that it considers that the Respondents had not suffered any relevant prejudice (including financial

prejudice) as a result of the failure to follow all of the consultation procedures as set out in the Section 27A Decision. The Applicant stated that the works carried out were part of a planned programme of works for roofing repairs to blocks of flats. In order to offer best value, the Applicant sought to procure works to all three blocks forming the Development as one contract utilising a competitive tendering procedure in line with the relevant public procurement regulations.

7. Tenders were received as follows:

Castle Roofing Ltd	£131,420.00
JMG Roofing Ltd	£125,321.00
Dent & Partners	£147,730.00
Darren Wilson Ltd	£144,995.00
RS Miller Roofing	£175,083.50

8. The contract was awarded to the party that submitted the lowest bid namely JMG Roofing Ltd and the Tribunal in the Section 27A Decision confirmed that the contract price was reasonable.

9. Dealing with the specific failings identified in the Section 27A Decision in respect of the consultation requirements, the Applicant noted that whilst its letter of 10 May 2013 failed to deal with the requirement to invite Leaseholders to nominate a person from whom the Landlord should try to obtain estimates, at no point throughout the consultation period did any leaseholder request to nominate a contractor of his, her or their own, or suggest that the tender submissions were not competitive. The Council's letter of 2 July 2013 did not specify at least two of the estimates although the Tribunal confirmed that it appeared to allude to the fact that the contract had been awarded to the party that submitted the lowest bid. Accordingly, on this basis the Applicant considered that the third stage of the consultation was not required and that letter did in fact advise that estimates could be inspected but did not specify the prescribed 30 day time scale. However, the Council did offer a date of 2 August 2013 for formal representations to be received from Leaseholders. This date was extended to 9 August 2013 to accommodate Leaseholders who wished to personally visit the Council's offices to inspect any documentation. The Applicant conceded that the letter of 2 July 2013 did not provide the prescribed summary of observations received in respect of the works, however, all the responses were individually acknowledged in writing.

10. Acknowledging that it did not specify the 30 day time scale in its initial letter of 10 May 2013, the Applicant advised that the further correspondence of 13 June 2013 allowed additional time to the prescribed 30 days and as such, the Council submitted that there was no prejudice to the Leaseholders as the facts of the matter show that it took an open transparent approach with the placement of

these works, giving the Leaseholders sufficient opportunity to raise any concerns, to view documents and make personal contact with the officers involved.

11. Of the 18 leaseholders within Dempster Court, the Applicant advised that 7 have paid the full amount of the roof repairs, 5 have instalment plans and 1 is being reviewed following financial statements. The remaining 5 are on hold pending the outcome of Tribunal proceedings.
12. The Applicant cites *Daejan Investments Limited v Benson et al* [2013] UKSC 14 (“*Daejan*”) in support of its case which states at paragraphs 44 and 45 of the decision:

“Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s.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.

Thus in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlords failure to comply with the Requirements 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 Applicant concludes that the extent, quality and cost of the works would have been the same had it complied fully with the consultation requirements and as no financial prejudice has been suffered by the Respondents, it was requested that the dispensation be granted.
14. The Leaseholder of 25 Dempster Court, Mr Alan Griffiths, submitted representations as a Respondent. His correspondence also related to the application that the Applicant had made for leave to appeal the Section 27A Decision, however, the comments also appeared to apply to this Application. Essentially, Mr Griffiths states that the Applicant’s argument that omissions in the consultation exercise caused no prejudice to the leaseholders was flawed, as no one could know how matters would have turned out had the procedures been followed in full. Further, he indicates that he and other residents were of the opinion that there are other ways in which roof repairs could have been carried out and possibly some of the tiles could possibly have been re-used. Mr Griffiths also states that the roof repairs were a planned improvement and not a repair due to the fact that one of the Applicant’s magazines indicated that all

communal buildings roofs were intended to be replaced as part of a planned improvement programme.

The Law

15. There is a statutory maximum that a lessee has to pay by way of a contribution to “qualifying works” (defined under Section 20ZA (2) as works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, Section 20 of the 1985 Act applies to qualifying works which result in a service charge contribution by an individual tenant in excess of £250.
16. There are essentially three stages in the consultation procedure, the pre tender stage; Notice of Intention, the tender stage; Notification of Proposals including estimates and in some cases a third stage advising that the leaseholders that the contract has been placed and the reasons behind the same.
17. It should also be noted that the dispensation power of the First-tier Tribunal under Section 20ZA of the 1985 Act only applies to the statutory consultation requirements and does not confer any power to dispense with any contractual consultation provisions which may be contained in the lease.

The Tribunal’s Determination

18. The parties are referred to the Section 27A Decision for the Tribunal’s comments on liability to pay, reasonability as to the carrying out of the works and cost of the works.
19. The Tribunal were, however, concerned that as some of the lessee applicants in the cases which produced the Section 27A Decision were also Respondents in this Application, that the practical effect of granting a dispensation would be to overturn the Section 27A Decision.
20. Accordingly, the Tribunal wrote to the parties stating that it was minded to strike out the application in the present proceedings under Rule 9(3) (c) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 on the basis that “the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal”. The parties were given 28 days to make representations on this point.
21. The Applicant responded essentially by stating:

- (a) There was no requirement in the legislation for an application under Section 20ZA of the 1985 Act for dispensation from the consultation requirements to be made prior to a decision under Section 27A of the 1985 Act.
- (b) Whilst the Section 27A Decision and the facts which produced it and the present Application, involve some degree of overlapping, the parties are not in fact the same in both sets of proceedings.
- (c) A determination under Section 20ZA is not the same as a determination under Section 27A, as the former is only concerned with whether it is reasonable or not to dispense with the compliance with the Regulations
22. None of the Respondents submitted any representations on the striking out point referred to above.
23. The Tribunal determine that it is not appropriate to strike out this present Application. The Tribunal find, that in considering Rule 9 (3) (c), the crucial issue is whether the rule is only engaged where the parties are exactly the same in both the present proceedings and the previous proceedings or whether the rule is also engaged where, as in this present case, the previous proceedings involved a sub-group of the parties in the present proceedings in which case (as may be inferred from the Tribunal's letter to the parties about striking out) it would only be applicable to the sub-group.
24. The Tribunal, however, interprets the term "the same parties" in Rule 9 (3) (c) as meaning that the parties must be **exactly** the same in both sets of proceedings and support for that interpretation may be obtained by considering the contrast between the requirement that the parties be "the same" and the requirement that the facts be merely "similar or substantially the same". Thus, in this present case, the parties in the proceedings which gave rise to the Section 27A Decision i.e. the previous proceedings, are not exactly the same as the parties to these present proceedings i.e. this dispensation Application, and therefore, striking out under Rule 9 (3) (c) is not applicable and the Tribunal accordingly, declines to strike out this Application as far as the sub-group of Respondents who were parties to the proceedings giving rise to the 27A Decision is concerned. The Application must, as a result be considered as far as **all** the Respondents to it are concerned.
25. In any event, there is no prescribed requirement as to the timing of a dispensation application and indeed in *Daejan*, there had, as in the present case, been a prior Section 27A Application where it had been found that there had been a failure to comply with the Regulations.

26. Applying *Daejen*, therefore, as the Tribunal is obliged to do, the only issue to be considered is whether the Respondents have been prejudiced which is dealt with in more detail in paragraph 29. onwards below.
27. With regard to the cost of the works, the Tribunal noted that the Applicant had conducted an extensive tendering exercise, which had resulted in five quotations and awarded the contract to the party that had submitted the lowest bid.
28. Section 20ZA of the 1985 Act does not expand upon or detail the circumstances when it may be reasonable to make a determination dispensing with the consultation requirements.
29. According to *Daejen*, the Tribunal should focus on the extent to which the tenants were prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the landlord to comply with the regulations. No distinction should be drawn between “a serious failing” and “a technical minor or excusable oversight” save in relation to the prejudice it causes. The financial consequence to a landlord in not being granted dispensation is not a relevant factor to be considered by the Tribunal nor is the nature of the landlord. The burden of proof in applications for dispensation remains throughout on the Landlord but the factual burden of identifying some ‘relevant’ prejudice that the Lessees would or might have suffered, caused by the Landlord’s failure to consult, is on the Tenants, that is to say the Respondents in this case. Where the Tenants say that they were not given the requisite opportunity to make representations about the proposed works to the Landlord, the Tenants have to identify what they would have said if the opportunity had arisen. In some cases, particularly with respect to extensive roofing works such as these works, expert evidence in the form of a surveyor’s report would have been appropriate to comment on the works and cost involved and to comment on the reasonability of alternative methods of repair such as patching. No such expert evidence was adduced by the Respondents and the Tribunal do not find that prejudice has been established based on the submissions of Mr Griffiths.
30. The Tribunal thus finds that the Respondents have not suffered any prejudice by the consultation procedures not being followed; the extent, quality and cost of the works were not in any way affected by the landlord’s failure to comply with the consultation procedures. The Tribunal noted in the previous proceedings and in these proceedings that a full tendering and consultation procedure was undertaken, albeit not in strict compliance with the Regulations.

31. The Tribunal is satisfied that the works were required and that, on the evidence provided, it is reasonable to dispense with the consultation requirements of Section 20 of the 1985 Act as there is no evidence to indicate that any leaseholder had been prejudiced applying the principles laid down in *Daejan*. Accordingly, dispensation is duly granted but on condition that the Applicant bears its own legal costs of this Application and the same are not included in the service charge.
32. What, therefore, is the practical effect of dispensation being granted? As far as those Respondents are concerned who were not parties to the proceedings which gave rise to the Section 27A Decision, then the Applicant can seek to recover their proportion of the roof repairs from them. With regard to those Respondents who were parties to the Section 27A Decision, then that decision must now be treated as having been modified by this retrospective grant of dispensation. In other words the limitation on recovery contained in the Section 27A Decision was always, in effect, subject to a retrospective application for dispensation being made and such dispensation being granted. As stated above, that must be the case, (and indeed must always be the case where a dispensation application follows a decision under Section 27A of the 1985 Act) because there is nothing in the 1985 Act (or indeed any other legislation) which precludes or prevents a landlord from making an application for dispensation once a Section 27A Decision has been issued. Therefore, as the dispensation is binding on those Respondents who were parties to the Section 27A Decision as well as the other Respondents, the Applicant can recover the cost of the roof repairs from them that is to say, from all lessees at the Development.
33. In making its determination, the Tribunal had regard to the submissions of the parties, the relevant law and its knowledge and experience as an expert Tribunal, but not to any special or secret knowledge.

Appeal

34. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

V WARD BSc Hons FRICS Chairman