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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LDC/2016/0027**
Property	:	**Churchill Gardens Estate SW1V 3DT (multiple blocks) and Holcroft Court, London W1W 5DF**
Applicant	:	**CityWest Homes Limited**
Representative	:	**Ranjit Bhose QC instructed by Judge & Priestley LLP**
Respondent	:	**Leaseholders of flat in the above properties**
Representative	:	**None**
Type of application	:	**To dispense with the requirement to consult lessees about major works/ a long-term agreement**
Tribunal members	:	**Judge Hargreaves** **Alan Manson FRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of hearing	:	**18th April 2016**

DECISION

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On condition:-

1. That the relevant service charge demands on each Respondent will not exceed the estimated contributions as set out in the section 20 notices dated 8th or 15th February 2012
2. That the Applicant will not seek to recover any of the costs incurred within or by this application from any Respondent,

The Tribunal grants dispensation to the Applicant pursuant to *s20ZA Landlord and Tenant Act 1985* in respect of any defects in the said notices dated 8th or 15th February 2012.

REASONS

1. The Applicant seeks dispensation under section *20ZA of the Landlord and Tenant Act 1985* from all/some of the consultation requirements imposed on the Landlord by *s20 of the 1985 Act*[1]. The application (p1) was issued on 26th February 2016. The grounds are set out in the accompanying statement of case (p11). The application is granted on terms which are not contentious to the Applicant (its application was put on the basis that unconditional approval should be granted), but the fact that they are expressed as conditions lends weight to the Applicant's proposals which were made in its written and oral submissions. In this case we have no hesitation in granting dispensation on these terms because they provide a better financial and practical outcome to those paying the relevant service charges than refusing dispensation would achieve.

2. The only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. This application does not concern the issue of whether any service charge costs will be reasonable or payable.

3. All references are to the Applicant's trial bundle except where otherwise explained.

4. Before dealing with the facts and the merits, we should clarify that a decision was made to proceed with the hearing pursuant to Tribunal Rule 34 notwithstanding the objection and absence of Roger Allen, chairman of the Holcroft Court Residents' Association. He has submitted a statement of case in response to the application which is in a bundle he prepared, together with evidence supporting an objection by the Hall family, of 57 Lenthall House, which we have read and taken into account. He applied for an adjournment on 2nd April which was refused by Judge Powell on 4th April. The application was renewed last week on the grounds that unless he could attend (he is abroad), there would be no-one else to make submissions against the application. On the grounds of the sheer numbers involved, the hearing proceeded in the absence of Mr Allen, it being in the interests of

[1] See the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987)

justice to do so. It would have been disproportionate to re-list. He had plenty of time from 4th April to send along another representative and it would not be just to re-arrange a hearing at his sole convenience. It was surprising that no-one else attended the hearing, but that might be taken as an overall indication of the strength of feeling of the Respondents, which as Mr Bhose carefully explained, largely supported the application (of 78 Respondents to the application, 56 support the application, 20 oppose it[2]: the details are set out in a schedule prepared for the hearing). Furthermore, apart from the case of Lenthall House (on the Churchill Gardens estate), a majority of Respondents in every other block of flats supports the application[3], so it has widespread support (see the first statement of Mr Humphries at p244). When taking into account the fact that all 539 lessees received a copy of the application and the statement of case, the relatively small number of opponents is highlighted and the strength of that opposition can be gauged further by reference to the fact that only two statements of case were received by the Tribunal. That is a major factor in support of the application. None of the evidence supplied by the Respondents deals in any detail with the considerable evidence, practical and expert[4] collated by the Applicant, which underlines the justification for dispensation.

5. In addition to having the benefit of Mr Bhose's careful and detailed submissions, the Applicant called two witnesses, Mr Humphries, and Mr Mannion, whose evidence (referred to below) was helpful and is accepted. Mr Humphries explained that the 39 lifts are about 40 years old: the plan is to replace the lift cars, motors and controllers, using the parts purchased in 2011 (see below) but to retain the car guides and the counterweights.

6. By way of brief introduction, this is a case about replacement lift parts which were already ordered on 10th November 2011 at a cost of roughly £2.4m before the relevant s20 notices were served in 2012. That was the main mistake which made the relevant s20 notices defective for the purpose of this application, because of the risk that there could not be genuine consultation. The Applicant aims to recover the majority of that cost from leaseholders' service charges. Therefore if it is not recoverable (above the £250 cap), the budgetary consequences are considerable. As the Applicant could not afford to "lose" £2.4m, if there is no dispensation then the Applicant will not use the purchased parts, will issue fresh s20 consultation notices, re-tender the contract described below and attempt to either re-sell the parts or mothball them for spare parts in the future. But not only are there potential adverse fiscal consequences for the Applicant, there are likely adverse financial consequences for the leaseholders if dispensation is not granted. The relevance of that lies in the application of the relevant legal principles, now encapsulated by the Supreme Court decision *Daejan Investments Limited v Benson* [2013] UKSC 14, and its effect ie that although the Applicant bears the burden of proof in establishing a case for dispensation, the Tribunal needs to consider *"whether the Respondents would suffer any relevant prejudice, and, if so, what relevant prejudice, as*

[2] These opponents received a copy of the Applicant's bundle

[3] Mr Bhose supplied detailed numbers for the respondents from each block which we do not consider it necessary to set out in detail in the decision

[4] And to the extent required, Rule 19 permission is granted to rely on the two expert reports in the bundle

a result of [the Applicant's] failure, if the s20(1)(b) dispensation was granted unconditionally."

7. The best way to deal with the application is chronologically, partly to deal with Mr Allen's written submissions. In 2007 the Applicant entered into a 10 year partnering contract (a QLTA[5] for the purpose of the service charge regulations) with PDERS, a lift company, part of the Otis group. That in itself required the Applicant to consult the leaseholders: examples of the relevant s20 notice are at p170 (17th March 2006) and the notice of the proposal to enter into the QLTA dated 13th December 2006 is at p173 with a summary of the responses to the March consultation exercise attached from p174A. Mr Bhose submitted that while the notices do not expressly refer to lift works, they were not invalid, though could have been expressed more clearly in terms of including renewal etc works to the lifts. Mr Allen takes a point on this in his submissions on whether the PDERS contract was valid in the first place with reference to its description and whether it was correctly advertised in Official Journal of the European Union, and accordingly we deal with this point first. The 2006 OJEU notice is at p10 of the Respondents' bundle and at p12 the *"Common procurement vocabulary"* includes the code 29221610, which is the code for all kinds of relevant lift works (repairs, maintenance, *and* renewal). In addition there was provision for a 10 year contract as an alternative to 5 years (see p14). The points taken by Mr Allen on the OJEU notice are therefore misconceived as the relevant works were correctly identified in the OJEU notice.

8. However, Mr Allen also wrote a lengthy letter to the Applicant on behalf of the Holcroft Court Residents Association dated 9th March 2012 (Respondents' bundle p7) in which some of these points were raised (ie after the relevant s20 notices were issued). There is a comprehensive answer in the Applicant's reply dated 7th November 2012 which was handed up at the hearing. As Mr Bhose no doubt correctly submitted, the validity of the PDERS contract is outside the Tribunal's jurisdiction, but to the extent to which the Tribunal requires to be satisfied that it is being asked to dispense with requirements which will otherwise lead to the implementation of a contractual relationship, it is not entirely irrelevant. In other words, if the contract was illegal in some way, the Applicant might be very hard pressed to make out a case for dispensation but as we are satisfied for our purposes that the PDERS contract is valid, that difficulty does not arise. If so, the monies paid to PDERS for the lift parts were validly paid for by the Applicant, even if premature for the purposes of a *s20* notice.

9. Having placed a 10 year contract with PDERS in 2007, there was an earlier exercise carried out with a view to lift repair and renewal in relation to other similar blocks on the Churchill Gardens estate in 2011. This exercise is described in paragraph 4 of Mr Humphries' second witness statement dated 12th April. To ensure PDERS was providing the best value for money in relation to those proposals a mini-tender exercise was conducted with Acre lifts. The results are at exhibit NH4 to Mr Humphries' second statement (which is not in the bundle). As a result, the PDERS prices were revised

[5] A qualifying long term agreement

downwards. Those prices were then used as the basis for the proposals before the Tribunal. Mr Humphries' evidence is that they represented very good value in 2011, and even better value now, and this is directly relevant to the first of the two conditions imposed.

10. The background to the *s20* notices is that a lift survey was carried out in 2006 (referred to in the letter dated 16th December 2014 at p185 for example). It is clear, having heard Mr Humphries' evidence, that works were required in 2011 and today that obviously remains the case, hence the majority support for this application. The total projected costs then were £5.497m (see p39). The Applicant asked engineers Faithful+Gould to undertake a benchmark exercise to check the prices (see eg p45-166); they were confirmed as reasonable and an order was placed in 2011 for the parts required for the planned works based on this advice.

11. After the 2012 *s20* notices were issued the Applicant was concerned that they were defective for the two reasons considered above ie (i) the wording of the notice of intention and (ii) the fact that parts had been pre-ordered. Legal advice confirmed that there was a risk that the notices were not compliant. The parts were placed into storage. We accept that they have been properly maintained and are useable.

12. As Mr Bhose submitted, the law on dispensation then was in an uncertain state: the Court of Appeal decision in *Daejan* was handed down in January 2011 and although the UKSC gave permission to appeal in the summer of 2011, the prevailing mood in the spring of 2012 was that the law would be applied unfavourably to any application for dispensation. The Supreme Court decision in *Daejan* was handed down in March 2013 and after that the Applicant started to reconsider its position. Mr Bhose was asked to and did account for the further three year delay since the spring of 2013, which he accepted required some explanation. Apart from the fact that the users of the lifts have no doubt encountered more years of inconvenience, the delay will not cause additional financial cost in terms of the amounts to be invoiced, and there is no evidence of other potential prejudice to any leaseholder caused by the dispensation.

13. Four factors account for the delay since the spring of 2013 when the *Daejan* decision was handed down. First, the Applicant served a *s20(b) LTA 1985* notice on 1st October 2013 to protect its position in relation to the costs already incurred (see eg p187). Secondly the Applicant instructed David Cooper, a lift expert, of LECS UK, to prepare reports on the lifts on the Churchill Gardens estate (p364) and Holcroft Court. His reports are dated March 2014. The critical conclusions are at paragraphs 6.14.1 (p322 and p372) and 7.2.8 (p325 and p375) ie that the lifts were long overdue for modernisation, and the most cost effective method would be within the 10 year contract with PDERS. Third, the Applicant conducted an extra-statutory consultation in the form of a letter to leaseholders dated 16th December 2014 (p185) to which there were numerous replies, with a summary of the replies and responses prepared by John Millichope[6] at p198-

[6] It was also suggested that the absence or early retirement of this employee had caused delay

202 in March 2015. Exhibit NH1 at p249-300 contains the letters received and the Applicant's responses, which on the whole could be said to raise and answer numerous points, it being significant to note that none of the critical voices translated into attendance before the Tribunal. On that basis it can be taken that the answers provided by Mr Humphries went some way to dealing with the criticisms and questions levelled at the Applicant. Fourth, the Applicant instructed Faithful+Gould to carry out an independent benchmark review which was produced by Mr Mannion in December 2015 (p36).

14. Of particular note are the following conclusions in the Faithful+Gould report. As is clear from p39, if the lift works were to be carried out at current prices, using the existing equipment and PDERS, the additional cost would be over £300,000. In addition, the difference between updating the PDERS labour rate (now £42.83 per hour) compared with the current market rate per hour (over £80) would achieve a saving of around £1m if PDERS is retained (its rates being now based on the 2007 contract). Finally (p40) if the lift works were to be re-tendered in the open market the cost might be around £7.5m compared with the cost of updating the PDERS contract, making a difference of over £1.6m. Mr Mannion gave oral evidence that the 2011 deal was good value for money, and that carrying out the works using the purchased parts and PDERS represented good value now.

15. It is clear that the costs of re-tendering would have considerable negative consequences for the Applicant and the leaseholders: the cost could be around £7.5m. Dispensation in round terms saves the leaseholders £1.5-2m.

16. In addition the Tribunal takes into account the Applicant's stated position on manufacturer's warranties and guarantees, bearing in mind that the parts purchased are now nearly 5 years old. Mr Humphries explained (paragraphs 4 and 5 of his second witness statement that extended warranties have been arranged as follows:- (i) 4 years from the date of installation for the lift controllers and (ii) 3 years from the date of installation for the lift motors. The Tribunal was invited to record that the Applicant has agreed to bear any costs incurred relating to the repair and/or renewal of (i) any lift controller for a period of 4 years from the date of installation and (ii) any lift motor for a period of 3 years from the date of installation, which provides additional protection for the leaseholders bearing in mind the delay.

17. From the above we have concluded that this is a strong case for dispensation. The Applicant has taken several careful steps to protect the leaseholders and secure the best outcome, and there is no evidence of prejudice to the leaseholders which would outweigh the merits of the application, given the conditions imposed, which place the leaseholders in the position they would have been in (so far as possible) had the parts not been purchased prematurely.

Judge Hargreaves

Alan Manson FRICS

19th April 2016