FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BE/LDC/2023/0074**
Property	**:**	**All residential leasehold properties Managed by the London Borough of Southwark**
Applicant	**:**	**London Borough of Southwark**
Respondents	**:**	**All leaseholders**
Participating Respondents	**:**	**The leaseholders listed in the Schedule**
Application	**:**	**Dispensation from consultation requirements - sections 20 and 20ZA Landlord and Tenant Act 1985**
Date of Hearing	**:**	**27 August 2024**
Date of decision	**:**	**8th October 2024**
Tribunal Member	**:**	**Regional Judge Whitney Mrs A Clist MRICS**

DECISION

BACKGROUND

1. London

2. As a result of that decision the matter was transferred to the Southern Region for the purpose of case management.

3. Directions were issued by Regional Judge Whitney on 10 June 2024. Subsequently the matter was listed for a hearing at Taylor House in London on 27 August 2024.

4. We were provided with an electronic hearing bundle comprising of 569 pdf pages. We were told this was the same bundle as used at the earlier hearing save it included a copy of the actual insurance policy.

5. Shortly before the hearing various emails were received as set out below from Participating Respondents. Each indicated that they were content for the Tribunal to determine the application on the papers filed. Certain Respondents suggested in particular that their own time costs should be paid by the Applicant as a condition of granting dispensation if we were so minded to do so and provided a schedule of such costs.

6. Emails were received as follows:

    - Mr S Shaw 16th August 2024
    - Mr N Martindale 19 August 2024 and schedule of costs
    - Mr B O'Brien 19 August 2024 and schedule of costs
    - Ms C Barnard 21 August 2024, updated 22 August 2024 including skeleton argument and schedule of costs

7. The Tribunal proceeded with the hearing listed to ensure any and all Respondents and leaseholders notified of the application could attend if they choose to do so.

8. References in [ ] are to pages within the hearing bundle.

The Law

9. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations provide that where the lessor intends to enter into a qualifying long term agreement being an agreement for more than 12 months, with a cost of more than £100 per annum 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.

10. 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".

11. 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.

12. 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".

13. 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).

14. 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."

15. 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.

16. 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.

17. If dispensation is granted, that may be on terms.

18. The effect of Daejan has been considered by the Upper Tribunal in Marshall v. Northumberland & Durham Property Trust [2022] UKUT 92 (LC) to which were referred.

Hearing

19. The hearing took place at Taylor House on 27 August 2024. No Respondents or leaseholders of the Applicant authority were in attendance. Mr Walsh of counsel attended with representatives of the Applicant local authority. All of the local authority witnesses were available to give evidence.

20. Mr Walsh had supplied a skeleton argument and authorities bundle. The Tribunal had considered the same in advance together with the hearing bundle and all of the submissions refereed to above made by and on behalf of the Respondents.

21. The hearing was recorded although we set out a precis of the hearing.

22. Mr Walsh confirmed he had seen the representations received from the various Respondents. He submitted that the Applicant should be granted unconditional dispensation from the statutory consultation requirements.

23. He submitted that the Applicant had looked to enter into a long term qualifying insurance contract. For the initial 3 year term the premiums would total about £26 million rising to a total cost of £44 million if the contract ran for the whole 5 year period. This was to provide cover for the approximately 14,000 leaseholder the Applicant had within its residential portfolio.

24. The situation for local authorities in London changed after Zurich Municipal indicated it was looking to withdraw from providing cover for such risks. The Applicant had looked to the market generally but was hampered as only one insurer choose to bid. Generally property insurance of the type required by the Applicant has become increasingly difficult to find notably since the Grenfell Tower Disaster of which all were aware.

25. He submitted that the Applicant had obtained a bid from one insurer only, Prospect. Therefore they had no choice but to accept the same. He suggested various of the issues raised by Respondents were not matters this Tribunal should consider as part of this application being matters relating to the service provided. He suggested that in this situation there was a market of one insurer and it is reasonable for dispensation to be granted. He suggests that none of the Respondents can point to what they would have done differently if they were consulted.

26. Mr Walsh relied upon the witness statements within the bundle of Louise Turff [122-128], Tabitha Cox [143-150], and Karen Hawkins [160-162]. Mr Walsh also relied upon the statement of Mr Stephen Angel who he called to give oral evidence.

27. Mr Angel had given a statement [154-159] which he confirmed was true.

28. Mr Angel explained that his organisation, Gallagher Insurance Brokers had approached the insurance market on behalf of the Applicant to obtain insurance cover.

29. Mr Angel confirmed that at the end of the initial 12 month period the rate charged has remained the same. He explained that the Council is bound by the terms although the insurer could end the agreement.

30. Mr Angel confirmed that there was still only the one insurer within the market for this type of policy. No new entrants had joined the market as far as he was aware.

31. On questioning by the Tribunal he confirmed the numbers of leaseholders set out in the schedule [304] within the Insurance Tender document produced by Gallagher was accurate.

32. He confirmed that pre Grenfell generally insurers wanted limited information about the buildings being covered and didn't raise questions about their construction. Subsequently insurers started making increasing demands on the information they required. In his opinion Southwark were in no different a position to most other local authorities in scrabbling to get together the information being asked for. In his opinion the timeframe allowed by Southwark for the exercise was what he would expect from a local authority.

33. Mr Walsh confirmed he relied upon his submissions within his skeleton argument.

34. He confirmed that he was instructed that the Applicant was not seeking to recover any and all costs incurred up until 5th March 2024.

35. Mr Walsh submitted that Southwark accepted an application was required for dispensation. However in his submission the objections made were without merit. He suggests the Participating Respondents have looked to make matters more complex, time consuming and expensive.

36. Mr Walsh suggests that the Tribunal should not attach a condition allowing the Respondents to recover their costs. In his submission the statements of case are incoherent and contain points which he submits are largely irrelevant. He suggests many of the matters raised relate to applications which are not before this Tribunal.

37. Mr Walsh suggested that no benefit of the doubt should be given to the Respondents since they had chosen to not even attend the hearing. In his submission he can see no justification for the amounts contained within the schedules claimed.

38. Mr Walsh concluded by inviting the Tribunal to grant unconditional dispensation given there are still no new entrants to the market.

Decision

39. **We grant the Applicant dispensation from the requirements to consult conditional upon them not seeking to recover any of their costs as a service charge from the leaseholders and upon them publishing this decision on their website so that all leaseholders can access the same.**

40. We considered all the documentation within the bundle and took particular care to read the various statements made by the Respondents [163-536]. We also paid attention to the recent emails and the skeleton argument of Ms Barnard dated 22nd August 2023(sic).

41. It is accepted by the Applicant that they did not comply with the statutory consultation requirements, hence an application for retrospective consent. The contract is one for buildings insurance which the Applicant is required to take out under the leases granted to all of its residential leaseholders. The policy taken out

by the Applicant is for a term exceeding 12 months for which leaseholders may be charged more than £100 in each 12 month period.

42. We pause there to note criticism seems to have been made that Southwark did not know the accurate number of leaseholders. We were satisfied by the evidence of Mr Angel that Southwark did have this information. In each year the number would change and hence the schedule within the Gallagher document.

43. The Applicant's witness evidence which we accept sets out the story. Much is not disputed, it is the consequences which remain in dispute.

44. Previously the Applicant had insured with Zurich Municipal which was to run until 31 March 2023. In 2022 the Applicant looked to go to the market to see what bids could be obtained. To that end they appointed Gallagher to act on their behalf. Sadly in September 2022 Zurich indicated it would not provide a bid.

45. Ultimately one bid only was obtained for a 3 year policy with options to renew for an additional 2 years from Protector. Protector was the only company who provided a bid.

46. Zurich indicated it would provide a short extension but conditional on no other bids being received. The costings for the bids is within the witness statement of Luise Turff [124 & 125]. Ultimately the Applicant entered into the agreement with Protector.

47. We accept the evidence that the Applicant tested the market and there was only one company prepared to provide a quote. We are satisfied given the evidence of Mr Angel this remains the case. We do not believe that this point is actually challenged by the Respondents.

48. The Respondents suggest that the Applicant could have looked at seeking different terms such as only a single year policy. The Respondents suggest that 15 out of 18 London Boroughs with insurance with Protector have 12 month policies only. The Respondents suggest a 12-month policy would have allowed Southwark to renegotiate terms.

49. We are mindful that Lord Neuberger in Daejan reminded us that we should be sympathetic to tenants in determining if they have suffered prejudice. In this instant case the leaseholders raise various issues within the statements we have referred to above. However many of these in our judgment relate to matters concerning the services which they receive as a whole from Southwark.

50. We note what is said by Ms Cox in her witness statement. She explains that a Notice of Intension was served on 30th June 2022 [151]. This notice received some 15 observations only.

51. It was unclear to this Tribunal what it was being said Respondents would have done differently if they had been consulted and how this may have changed the final decision made. We accept we have the benefit of hindsight that we are told the costs of the policy in the second year have not risen. However we accept that given the size of the contract and the complexities of the same at a time when only one

insurer was prepared to offer cover it was in our judgment reasonable for the Applicant to enter a long term agreement as it has being what is referred to as a 3+2 contract. We are satisfied that even if there had been ful and proper consultation this is the decision the Applicant would have made having regard ot all of the evidence before us.

52. We accept Mr Walsh' submission that the Applciants had no choice but to insure with Protector and to take the terms offered. It is clear to this Tribunal that their negotiating hand was not strong and to enter into the agreement was in our judgment reasonable.

53. Various conditions are suggested by the Respondents notably Ms Barnard and Mr Martindale. These include submission that the Applicant should bear the costs which the Respondents have personally incurred and each who seeks such condition has attached a costs schedule.

54. We accept we could impose such a condition. Daejan makes clear that the Tribunal has a broad discretion as to what if any condition should be attached. The payment of costs to leaseholders is something referred to within Daejan.

55. However in this instant case we are satisfied it can be distinguished. Whilst the Respondents have plainly spent substantial time dealing with the application in our judgment this is akin to litigation. These are not costs effectively of investigating or considering what if any prejudice they may have suffered but time spent in litigating the case. We are not satisfied that these are costs that they ought to be able to recover on the facts of this case.

56. We have looked at the other conditions suggested and also applied our own expert knowledge. We find that save as set out below it would not be reasonable to attach any condition to the granting of consent. We are satisfied that even if made aware that one bid only had been received it was not unreasonable for Southwark to have proceeded with the same. We are not persuaded that given the circumstances they would have looked to renegotiate a shorter contract. Southwark were seeking certainty of a long term agreement.

57. Mr Walsh submitted his clients were not looking to seek the costs incurred up until the original hearing in March 2024. For subsequent costs his clients position was reserved.

58. Given this application is relevant to in excess of 14,000 leaseholders we conclude that it is appropriate for the Applicant to bear the costs of the application. Whilst the application has perhaps been more protracted than initially expected by the Applicant it is for the Tribunal to determine the application and it is typical for hearings to take place in such large applications. We find it is reasonable and proportionate to attach a condition that the Applicant may not recover its costs as a service charge item from the leaseholders as a condition of granting dispensation. We are satisfied to do so is to adopt the position set out in Daejan.

59. We also attach a condition that the Applicant shall place a copy of this decision on its website so that all leaseholders have access to the same.

List of fully participating Respondents

1	Thufel Ahmed	
2	Ms Clare Boot (nee Barnard)	[redacted]
3	Ms Belinda Blanchard	[redacted]
4	Zerbabel Caumba	
5	Joshua Davidson	[redacted]
6	Tom Gilson	
7	Ms Joanne Green	[redacted]
8	Tereza Fritz	[redacted]
9	Jack Heath	[redacted]
10	Ms India Hill	[redacted]
11	Ms Elizabeth Izen	[redacted]
12	Mr Neil Martindale	[redacted]
13	Ms Elaine Mills	
14	Mr Brendan O Brien	[redacted]
15	Mr Nick Pandy	[redacted]
16	Ms Daniella Palmer	[redacted]
17	Ms K Papachristou	[redacted]
18	Ms Sophia Senton	[redacted]
19	Ms Sharon Shahani	[redacted]
20	Jatinder Singh	
21	George Stowell	[redacted]
22	Ms Danielle Valens	

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.