12465

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BH/LSC/2016/0064**
Property	:	**All properties held on residential long leases from the London Borough of Waltham Forest**
Applicant	:	**The London Borough of Waltham Forest ("the council")**
Respondents	:	**The 16 residential long leaseholders listed in parts A and B of the first schedule to this decision**
Type of application	:	**To dispense with the requirement to consult lessees about four long term qualifying agreements**
Tribunal members	:	**Angus Andrew** **Hugh Geddes JP RIBA MRTPI** **Owen N Miller BSc**
Date and Venue of hearing	:	**19 September 2017** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**17 October 2017**

DECISIONS

DECISION

1. We dispense with the consultation requirements imposed on the council by section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act") in respect of the Breyer, Apollo, Aston and Osborne Qualifying Long Term Agreements.

OUR PREVIOUS DECISION

2. On 25 January 2017 we issued a decision on an application by the respondents listed in part A of the schedule to this decision for a determination of their liability to pay various service charges. The application was made under section 27A of the 1985 Act ("our previous decision"). That decision sets out the background to this case and we do not propose to repeat it here. Where relevant, we use the terms defined in paragraph 8: the relevant statutory framework is set out in paragraph 24-31 and the relevant consultation requirements can be found in schedule 2. Numbers in square brackets in this decision refer to page numbers in the document bundle.

3. Our previous decision records the following breaches of the statutory consultation requirements that are relevant to the application that is now before us:-

   a. The Breyer/Apollo intention notices fell short by two days

   b. The Breyer/Apollo proposal notices fell short by one day

   c. The Aston/Osborne intention and proposal notices fell short by one day

   d. The proposal notices in the respect of the Aston/Osborne QLTAs did not disclose a connection between the council and Aston.

THE APPLICATION AND PROCEDURAL HISTORY

4. By an application made under section 20ZA of the 1985 Act and received on 9 February 2017 the council sought dispensation from the consultation requirements.

5. The respondents listed in the part A of the schedule to this decision were named as respondents. The application also gave details of a number of recognised tenants associations.

6. On 1 March 2017 Judge Andrew gave directions with the intention that the dispensation application would be heard on 19 June 2017. As a result of an administrative oversight, for which we apologise on behalf of the tribunal,

those directions were not sent to the council. When the mistake was discovered Judge Andrew reissued his directions on 28 April 2017. Amongst other things the directions:-

(a) Required the council to maintain a copy of our original decision on its website.

(b) Required the respondent to send to each of the tenants associations and each of the council's other long residential leaseholders copies of:

i. The application form

ii. The directions

iii. A covering letter explaining where on its website our original decision might be viewed.

(c) Invited the tenants associations and other residential long leaseholders to apply to the tribunal to be joined in the proceedings.

7. We are satisfied that these directions were complied with and we were told at the hearing that the relevant documents had been sent to 2,099 residential long leaseholders.

8. Applications to be joined as respondents were received from the tenants listed in part B of the schedule to this decision and they were joined by orders made on 14 June 2007 and 23 June 2007.

9. Statements of case opposing the dispensation application were received from Dorota Podobas, Virginia Parry, Jayne Ryan & Ben Hibberd, Nigel Kandzia and L Wilmot. No objections were received from the applicants to the original section 27A application. Thus of the council's long leaseholders who were given notice of the dispensation application only 5 actively opposed it.

THE HEARING AND PROCEDURAL ISSUES

10. We heard the dispensation application on 19 September 2017. The council was represented by Ranjit Bhose QC, a barrister. Of the listed respondents only Mr Wilmot appeared in person.

11. Erkan Ozer and Maureen McEleney gave evidence on behalf of the council. Mr Ozer is the council's current home ownership manager and Ms McEleney is an assistant director of Housing Services. Mr Wilmot gave evidence on his own behalf. Mrs Tonner attended for the part of the hearing. Mrs Tonner is the wife of Gary Tonner who made the original application under section 27A of the 1985 Act. With our permission Mrs

Tonner made some closing submissions on her husband's behalf although she did not offer any formal evidence.

12. Mr Wilmot requested permission to hand in (a) further evidence and (b) further representations in the form of a skeleton argument. He said that he had only appreciated the significance of both the evidence and the further representations after he had received the council's response to his statement of case. Mr Bhose agreed to our reading the additional evidence but he objected to the further representations on the grounds that they raised new issues and objections that might result in an adjournment of the hearing to enable the council to adduce rebuttal evidence.

13. Having read Mr Wilmot's further representations we agreed to let them in. The issues identified by Mr Wilmot relied on the documents disclosed by Mr Ozer who was perfectly capable of responding to them. We also permitted Mrs McEleney to deal with the issues by giving oral evidence. Consequently the council was not prejudiced by the further representations.

ADDITIONAL BREACHES

14. Two of the respondents who oppose the dispensation application asserted that there had been additional breaches of the consultation requirements in respect of the four QLTAs that were specific to them and thus had not been considered at the hearing in November 2017.

15. These assertions begged a fundamental question: should we restrict the application to those breaches determined in our original decision or should we consider the additional breaches asserted by those respondents who were not parties to the original 27A application? As only two of the joined respondents asserted additional breaches we were able to properly consider them at the hearing.

16. Mr Kandzia in his statement of case stated that he could not find any notice of intention to enter into a QLTA with Osborne and he was *"therefore sure that this was not sent to me or the managing agent"*.

17. Mr Wilmot gave evidence of four additional breaches:

    a. He did not receive either the intention or the proposal notices in respect of the Aston/Osborne QLTAs

    b. He could not recall receiving the intention notice in respect of the Breyer/Apollo QLTAs

c. The council had not responded to observations that he made in a letter of 20 September 2010 [145D] that was sent in response to the Breyer/Apollo proposal notice

d. The council had not responded to observations that he made in a letter dated 31 December 2011 [141] sent in response to Aston/Osborne proposal notice.

OUR FINDINGS ON THE ADDITIONAL BREACHES

The council did not serve the intention and/or proposal notices on Mr Kandzia and Mr Wilmot

18. Mr Ozer repeated the evidence that he had given at the previous hearing. He confirmed that the intention and proposal notices had been sent to Mr Kandzia and Mr Wilmot and a number of the notices, correctly addressed, were exhibited to his statement. His evidence in this respect was not challenged. Rather Mr Kandzia and Mr Wilmot asserted that they had not received the notices and that in consequence the notices had not been served on them.

19. We dealt with similar assertions made by a number of the part A respondents (applicants to the original section 27A application) at paragraphs 63-66 of our previous decision. The copy leases included in the hearing bundle contain clauses to the effect that section 196 of the Law of the Property Act 1925 shall apply to any notices served under them. As section 196 applies to the consultation notices, so does section 7 of the Interpretation Act 1978. As we pointed out to Mr Bhose there remains an issue as to whether section 7 creates a revocable or irrevocable presumption of service. If it creates an irrevocable presumption of service then that is an end of the matter: the notices were served on Mr Kandzia and Mr Wilmot.

20. If however, section 7 creates only a rebuttable presumption then its effect would appear to be to reverse the burden of proof. The council having satisfied us that the notices were properly sent to Mr Kandzia and Mr Wilmot by post the burden of proving that they did not receive those notices rests on their shoulders.

21. Mr Kandzia's evidence was not persuasive. In his statement he simply said that he was not *"sure"* that the notice was sent either to him or to his agent. Furthermore because he did not attend the hearing for cross examination his evidence carries little weight. Consequently we are satisfied and find that the Osborne intention notice was received by his authorised agent, to whom it was properly addressed.

22. In his evidence Mr Wilmot asserted that he had not received the notices because they had been sent to the wrong address. Mr Wilmot's flat, in

respect of which he pays service charges, is in Astins House, London E17. However the flat has at all material times been let to tenants and Mr Wilmot's home and correspondence address is in Hertfordshire. In answer to Mr Bhose's question Mr Wilmot accepted that run of the mill service charge correspondence is properly addressed to his Hertfordshire home and that he receives it. He concluded however that because he does not always receive important consultation notices and the like at his home address, the council must be operating two separate data bases and he believed that they had been sending the consultation notices to Astins House. He told us that his tenants did not forward any post addressed to him, to his home address.

23. Mr Ozer's evidence was however unequivocal. He told us that the council only had one data base and that all correspondence had been sent to Mr Wilmot at his Hertfordshire correspondence address. Further, Mr Wilmot's assertion, that important documents had been sent to Astins House, was not supported by the various copy letters and notices exhibited by Mr Ozer, all of which were correctly addressed to Mr Wilmot's Hertfordshire address.

24. Mr Wilmot's hypothesis of two data bases was not credible and we discount it. We appreciate that Mr Wilmot is attempting to recall events that took place between 5 and 8 years ago. The more likely explanation is that he simply cannot now recall receiving documents that were sent to him. Indeed he accepted, in respect of the Breyer/Apollo intention notice, that he could not *"recall"* receiving it.

25. It follows therefore that Mr Wilmot was not able to satisfy us, let alone prove, that he had not received the disputed intention and proposal notices. Consequently we find that they had been served on him.

<u>The council failure to respond to Mr Wilmot's letter of 20 September 2010</u>

26. The issue was not so much whether the council had regard to Mr Wilmot's observations and then responded to them but whether the observations had been made within the relevant period or at all.

27. Mr Ozer's evidence was again unequivocal. The council kept an observation log and recorded all observations received [136/7]. A copy of the observation log was exhibited to Mr Ozer's statement and it shows a large number of observations in a 10 column table, including a summary of the observations and the council's comments. Mr Wilmot's letter is not included in the log. In the context of the Breyer/Apollo proposal notice the process continued until 5 October 2010. No observations were logged as being received from Mr Wilmot during this period.

28. In his statement of case Mr Wilmot asserts that the council had not responded to the observations contained in his letter of 20 September

2010 although he was, at that time, unable to locate a copy of the letter. By the time of the hearing he had managed to locate the letter on his computer system. He exhibited a copy of the letter and a copy of the relevant computer folder to the supplementary representations that he handed in at the hearing [1456D and E]. It was a one page letter and in essence it objects to the *"Time and Materials contracts"* that result from qualifying long term agreements. The computer folder shows that the letter was created on 2 September 2010: that is 18 days before it was posted. Mr Wilmot's explanation for this time delay was that during the intervening period he was *"working on the letter"*. He also explained that he had originally been unable to locate the letter because he had saved it in the wrong folder and he had only discovered it shortly before the hearing.

29. Again we have some difficulty with Mr Wilmot's evidence. It is difficult to understand how he could have spent 18 days *"working"* on a one page letter. Having saved the letter in the wrong folder we consider the more likely explanation is that Mr Wilmot had lost sight of it and that it was never sent to the council. Certainly we prefer the evidence of Mr Ozer and we find that the observation letter was not sent to the council and that consequently there was no breach of the consultation requirement.

The council's did not respond to Mr Wilmot's observations contained in his letter of 30 November 2011

30. Having found that the Aston/Osborne proposal notice was served on Mr Wilmot his last date for making observations was 31 December 2011 (see paragraph 67 to 79 of our previous decision). Mr Wilmot relied on his letter of 31 December 2011. Even if correctly addressed the letter would not have been received by the council until 2 January 2011 at the earliest and consequently the observations included in the letter would in any event have been out of time. However, the point was not taken by Mr Bhose and the issue between the parties was similar to that contained in the previous section.

31. The letter is addressed to Ascham Homes Ltd, Property and Investment Group, 195 Wood Street, London E17 3NU [141]. Mr Ozer's unchallenged evidence was that Ascham Homes had vacated the Wood St address at least 6 months before the date of the letter and that the forwarding instructions to the postal authorities had expired by the time that the letter was sent.

32. Mr Wilmot's explanation was that he had received no communication from the council during the intervening 6 months period and that the council had not informed him of the change of the address. Although he did not put it in these terms the logic of his explanation was that because the letter had been sent to the council's last known address, the observations contained within it had been made and the council had failed to respond to them.

33. Again we have some difficulty with Mr Wilmot's evidence. His assertions that he was unaware of the council's change of address for a period of more than 6 months is inconsistent with his acceptance that he was receiving "run of the mill" service charge correspondence at his home address. In summary Mr Wilmot sent his observations to a redundant address and consequently they were not made within the meaning of the consultation requirements and the council was not therefore obliged to respond to them.

34. Before moving on we would add that even had we found that the additional breaches had occurred we would nevertheless still have considered it appropriate to grant dispensation for each and all of the reasons set out in the following section of this decision.

REASONS FOR OUR DECISION TO DISPENSE WITH THE CONSULTATION REQUIREMENTS

35. The tribunal directions specifically drew the party's attention to the Supreme Court decision in Daejan Investments Ltd v Benson and Others [2013] UK SC40. The respondents were also invited to include in their statement of case:-

    (a) Representations as to whether it may be appropriate for the Tribunal to grant dispensation "on terms"; and

    (b) Evidence of what they might have done differently if the applicant had complied with the full statutory consultation process.

36. Lord Neuberger gave the lead judgment in Daejan. In describing the proper approach to dispensing under section 20ZA(1) he said at paragraph 44:-

    "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 [now the Property Chamber] *should focus when entertaining an application by a landlord under section 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".*

37. Mr Wilmot rightly points out that Daejan was concerned with breaches of the consultation requirements relating to the letting of a major works contract. By contrast, in this case we are concerned with breaches of the consultation requirements relating to the letting of qualifying long term agreements.

38. However, the distinction does not assist Mr Wilmot. A qualifying long term agreement consists largely of schedules of rates that are then applied to future works undertaken by the contractor during the period of the

agreement. Those works will generally take the form of either responsive repairs or major works that are themselves subject to a consultation regime under schedule 3 to the 2003 Regulations. Consequently nothing is payable immediately by the long leaseholders under a qualifying long term agreement. In due course the responsive repairs or major works will be procured by the council using the schedule of rates specified in the qualifying long term agreement. The long leaseholders will receive service charge demands in respect of the cost of those responsive repairs or major works. They will however still have the option of challenging the cost by making an application to this tribunal under section 27A of the 1985 Act. As Lord Neuberger points out in his judgment the long leaseholders will always have the protection of section 19(1) of the Act so that they cannot be required to pay either more than is reasonable or for work that has not been undertaken to a reasonable standard.

39. Turning to the five respondents who had submitted statements of case they relied almost entirely upon the council's failure to comply with the consultation requirements and what they considered to be the unreasonable cost of various major works projects to which they had been required to contribute through the payment of their service charges. As Lord Neuberger points in his judgment non-compliance with the consultation requirements does not in itself amount to prejudice. The respondents, as observed above, always had and still have the option of challenging any major works costs by an application under section 27A of the 1985 Act.

40. Only Mr Wilmot came close to saying what he might have done differently had the council complied fully with the consultation requirements. In that section of his supplementary representations to which Mr Bhose had objected he lists five objections to qualifying long term agreements in general. Some of his objections are misplaced. For example he objects to a management uplift that, we were told, is not priced under the QLTAs but charged separately when the service charges are invoiced. He also suggests that long leaseholders should have a right of appeal when their objections are not listened to: that however is a criticism of the statutory consultation requirements rather than the specific QLTAs under consideration.

41. Mr Wilmot's objections are not an answer to the question of what he would have done differently if the council had fully complied with the consultation requirements. He does not suggest for example, that for some personal reason the slightly truncated observation periods prevented him from making crucial observations at the appropriate time. Equally he does not suggest that he was unaware that the council had previously entered into a QLTA with Aston.

42. Even had Mr Wilmot made these objections in response to the consultation notices we are satisfied that they could not realistically have had any effect on the outcome of the consultation process. Notices of the proposed agreements were placed in the European Journal and the tender returns

were evaluated with 40% of the valuation attributable to price and 60% to quality. On the basis of Mr Ozer's evidence the process was rigorous. Furthermore because the council itself ultimately has to pay approximately 83% of the costs incurred in the completion of any works it has a strong incentive to achieve best value. The council would not have been able to renegotiate the agreements without opening up the whole tender process. There is simply nothing in Mr Wilmot's generalised objections that would have justified such a course of action.

43. Consequently and for each of the above reasons we are satisfied that none of the respondents were prejudiced by the breaches of the consultation requirements identified in our previous decision. All the long leaseholders having been given the opportunity to oppose the application we are satisfied that it is appropriate to grant dispensation in respect of any breaches of the consultation requirements.

44. Turning to costs we considered briefly whether it might be appropriate to grant dispensation subject to the council paying the respondent's costs incurred in either or both of the tribunal proceedings. However despite the explicit invitation in the tribunal directions none of the respondents had suggested that dispensation should be granted on terms let alone explain what those terms should be. Certainly none of the respondents had identified any costs that they had incurred. Consequently no terms are attached to the dispensation.

45. Finally we turn to section 20C of the 1985 Act. At the hearing in November 2016 the council through Mr Arden, undertook not to recover its costs incurred in the proceedings through the service charge. At our request the council had also given a written undertaking to that effect and at the hearing Mr Bhose confirmed the undertaking given through Mr Arden. We accept those undertakings at face value and consequently we do not consider it necessary to make a formal order under section 20C.

Name: Angus Andrew **Date: 17 October 2017**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then 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 tribunal sends written reasons for the decision to the person making the application.

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.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).