IN THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)
Case Ref: LON/00BE/LDC/2023/0074

LONDON BOROUGH OF SOUTHWARK — Applicant

- and -

ALL LEASEHOLDERS — Respondents

SKELETON ARGUMENT
ON BEHALF OF THE
APPLICANT FOR TRIAL

Counsel for the Applicant: Michael Walsh

References in [square brackets] are to the page numbers of the hearing bundle.

1. INTRODUCTION

1.1. This is the final hearing in respect of the application made by the London Borough of Southwark (the "Applicant") for dispensation from the requirements of section 20 of the Landlord and Tenant Act 1985 (the "LTA 1985"). The application **[2]** is dated 23 March 2023 and the Respondents are all the long lessees of leases of which Southwark is landlord (the "Application").

1.2. As explained, below, the Applicant's primary case is that it has complied with the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations") and does not require dispensation. If the Tribunal is against the Applicant on its primary case, then it seeks unconditional dispensation.

1.3. The Applicants invites the Tribunal to read the following documents before the hearing, if there is time:

(i) Application Form **[3]**

(ii) Witness statement of Louise Turff ("w/s LT") dated 8 August 2023 **[122]**

(iii) Witness statement of Tabitha Cox ("w/s TC") dated 15 November 2023 **[143].**

(iv) Witness statement of Stephen Angel (w/s SA") dated 16 November 2023 **[154]**.

(v) Witness statement of Karen Hawkins ("w/s KH") dated 19 December 2023 **[160]**.

(vi) Respondents' documents set out in the next paragraph.

1.4. The Applicant understands the Respondents who are participating in the hearing are as follows. The bundle page number of their statement of case or documents relied upon them in support of their opposition to the application are in square brackets.

(i) Clare Barnard **[163]**;

(ii) Brendan O'Brien **[192]**;

(iii) Stephen Shaw **[317]**; and

(iv) Neil Martindale **[322]**.

1.5. This is an important and high value application. The contract in relation to which the Applicant seeks dispensation has a value of just over £26 million and concerns approximately 14,000 flats let on long leases across the London Borough of Southwark. If the optional two-year extension is taken into account, the value of the contract is almost £44 million.

2. BACKGROUND

2.1. The Application seeks dispensation (if necessary) in relation to some of the consultation requirements it was required to follow prior to entering into a policy of insurance for all the flats let on long leases, which is a qualifying long-term agreement within the meaning of the LTA 1985 and the Regulations.

2.2. The long leases of the flats of which the Applicant is landlord contain the following covenant:

"to insure the building to the full insurance value thereof against destruction or damage by fire tempest flood and other risks against which it is normal practice to insure or to make other appropriate and adequate arrangements and in the event of destruction or damage by any such risk as aforesaid to rebuild or reinstate the flat and the building"

2.3. The Applicant had insurance cover with Zurich under a contract that operated between 1 April 2018 to 31 March 2021, which contained an option to extend for 2 twelve-month periods at the Applicant's sole discretion. Those options were exercised and the second of those extensions ended on 31 March 2023 (w/s LT §3 **[123]**).

2.4. In February 2021, prior to accepting the final year long extension with Zurich, the Applicant formed a leasehold working group to discuss whether to re-tender or extend. The members of that working group decided to accept the extension and then re-tender in 2022. Then in April 2022, the Applicant contacted the Residents Participation team for advice on forming a smaller working group who would assess the tenders received. As set out in the w/s TC at §4 **[144]**, the working group eventually consisted of 3 members, who were kept fully appraised of the Applicant's attempts to obtain tenders for a new policy of insurance.

2.5. The Applicant decided to invite tenders for the building insurance contract and therefore served a Notice of Intention pursuant to Schedule 2 of the Regulations on the Respondents on 30 June 2022 **[129]**. It invited observations, of which 15 were received. A summary of the observations received from tenants pursuant to paragraph (1)(2)(e) of Schedule 2 of the Regulations was set out in the Notice of Proposal dated 21 May 2023 **[134]**.

2.6. The tender was sent out on 4 October 2022, with the closing date for receipt of proposals on 11 November 2022 (w/s LT §4 **[123]**).

2.7. On 26 September 2022, prior to the formal start of the tender process, Zurich informed the Applicant that it would not be submitting a bid due to a change in corporate strategy. However, it offered the Applicant the option of an extension if the tender

process was unsuccessful (w/s LT §5). As set out in the w/s TC §12 **[147]**, it was made clear to the Applicant that Zurich was only prepared to act as an insurer of last resort, and it was a condition of an extension that the Applicant was to provide regular updates on the tender process.

2.8. Potential bidders sought further information from the Applicant about blocks up to 6 storeys and the reinstatement valuations for each block in the Borough. Given this information was not immediately available, an extension of time was granted to the bidders so that tender submissions were due at noon on 25 November 2022 (w/s LT §6).

2.9. Following the deadline, no bids were received. Thereafter the Applicant examined various options, which are set out in the w/s LT §8 **[124]**. On 10 March 2023, Zurich an extension of 3 months to its policy at an annual premium of £8,465,936, which was £2,116,484 pro rate (see w/s TC §20 **[149]**). This was conditional upon not having any other offers for insurance and was intended to ensure the Applicant was not without insurance.

2.10. On 16 March 2023, an insurer called Protector offered the Applicant insurance on the following terms:

Premium:	£8,723,934 exclusive of Insurance Premium Tax
Excess:	£350 for any one loss, £500 for scape of water and £1,000 for subsidence.

2.11. Although the terms were less favourable than the previous Zurich policy, the premium offered was broadly comparable to the annual premium offered by Zurich on for the 3-month extension.

2.12. However, following the receipt of the proposals by Protector, the condition of Zurich cover lapsed. Zurich also made it clear to the Applicant that it would not extend its policy beyond the 3-month extension.

2.13. As there were no other bidders and the option to renew with Zurich was not available, the Applicant had no choice but to accept the proposal from Protector on 29 March 2023 (w/s TC §25 **[150]**) and cover commenced on 1 April 2023.

2.14. On 21 May 2023, the Applicant served on the Respondents a Notice of Proposal pursuant to paragraph 5 of Schedule 2 of the Regulations **[134]**.

2.15. The general background to the difficulties encountered by local authorities attempting to insure their leasehold properties is set out in the witness statement of Stephen Angel **[154]**. When the tender process described above produced no bids Gallagher Insurance Brokers on behalf of the Applicant approached the market directly. Mr Angel describes the situation encountered in §§30-31 of w/s SA **[158]**:

> *30. Gallagher therefore approached the market directly in order to see if alternative cover could be secured:*
>
> *30.1 Accelerant via Avid made it clear that they were not in the market to accept any new leasehold insurance business after the 23 March 2023;*
>
> *30.2 Aspen explained that whilst it would seek to retain its existing risks, it was not in the market for new business;*
>
> *30.3 NIG also declined to quote, indicating that it had reached capacity in terms of the leasehold risks it was willing to underwrite.*
>
> *31. That left only Protector Insurance, who at that point had requested further information in order to consider whether it would be willing to offer terms.*

3. CONSULTATION REQUIREMENTS

3.1. What follows is a summary of the law on consulting tenants where the landlord wishes to enter into a qualifying long-term agreement ("QLTAs") where Schedule 2 of the Regulations applies. The Tribunal will be familiar with the duties incumbent upon the Applicant to consult pursuant to section 20 of the Landlord and Tenant Act 1985 (the "1985 Act") on major works and QLTAs.

3.2. Under section 20 of the 1985 Act there is a statutory maximum that the leaseholder must pay by way of a contribution to qualifying works or a QLTA unless consultation requirements have either been complied with or dispensed with by, or on appeal from the Appropriate Tribunal (the FTT in England). The procedure for consulting under section 20 of the LTA 1985 is governed by the Regulations.

3.3. The consultation requirements are contained in the Schedules to the Regulations. There are four schedules, and they apply as follows:

(i) Schedule 1 prescribes the requirements for QLTAs for which public notice is not required.
(ii) Schedule 2 prescribes the requirements for QLTAs for which public notice is required.
(iii) Schedule 3 prescribes the requirements for qualifying works under a QLTA and agreements to which regulation 7(3) applies.
(iv) Schedule 4 (which is divided into 2 parts) prescribes the requirements for qualifying works for which public notice is required (Part 1) and for which public notice is not required (Part 2).

3.4. In this case Schedule 2 applied (see regulation 5(2) of the Regulations). Schedule 2 outlines the consultation requirements for qualifying long-term agreements for which public notice is required. It specifies that the landlord must give written notice of their intention to enter into the agreement to each tenant and any recognised tenants' association. Additionally, it details the obligations of the landlord when entering into a contract for the carrying out of qualifying works, including stating reasons for awarding the contract and summarising and responding to any observations received from tenants or tenants' associations within a specified timeframe. Where the public procurement regime applies, the tenants do not have the right to nominate a contractor from whom an estimate must be sought.

3.5. The following is an overview of the procedure applicable in Schedule 2:

(i) **Step 1**: The landlord shall give notice in writing of his intention to enter into the agreement to each tenant and any recognised tenants' association (para 1, Sch. 2).

(ii) **Step 2**: the tenants or recognised tenants' association then have 30 days to make observations as to the proposed QLTA and the landlord have regard to those observations (para 2, Sch. 2).

(iii) **Step 3**: the landlord prepares, in accordance with paragraph 4 of Schedule 2, a proposal in respect of the proposed agreement.

(iv) **Step 4**: the landlord gives notice of the proposal prepared under paragraph 4 to each tenant and any recognised tenants' association. The notice shall have a copy of the proposal or give the place and hours where it may be inspected, and the notice shall invite observations in relation to the proposal (para 5, Sch. 2).

(v) **Step 5:** Where observations are received under paragraph 5, the landlord shall have regard to those observations (para 6, Sch. 2) and shall respond to them within 21 days of their receipt (para 7, Sch. 2).

3.6. It is the Applicant's primary case that it has complied with the Regulations in the process it adopted. As can be seen from the chronology in the foregoing paragraph, a Notice of Intention was served under paragraph 1 of Schedule 2 on 30 June 2022 **[129]**. Observations were invited and considered by the Applicant in accordance with paragraphs 1 and 3 of Schedule 2. These were then summarised in landlord's proposals (under paragraph 4) and then provided in the notification to tenants under paragraph 5 **[134]**. There is nothing in the Regulations or section 20 LTA 1985 that notification under paragraph 5 to be sent prior to entering into the contract.

3.7. There are material differences in the obligations on landlords between Schedules 1 and 2 of the Regulations because of the public procurement rules applying to public bodies. Indeed, there is no duty in Schedule 2, as there is in Schedule 1, to notify tenants that the landlord has entered into a contract, where the contract is not with one of the tenant's nominated contractors or the lowest estimate.

4. LEGAL FRAMEWORK FOR DISPENSATION

4.1. If, contrary to the Applicant's primary case, it is found that the Applicant has not complied with the Regulations, then it seeks unconditional dispensation from those requirements.

4.2. The law on dispensation is set out more fully at 11-46 to 11-61 of *Service Charges & Management* (5th Edition).

4.3. The power to dispense, under section 20ZA(1) of the 1985 Act, can be exercised if the FTT is "satisfied that it is reasonable to dispense with the requirements". The sub-section says:

> *"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."*

4.4. In *Daejan Investments Ltd v Benson* [2013] 1 W.L.R. 854, the Supreme Court held that the purpose of the consultation requirements is to ensure that tenants are protected from paying for inappropriate works, or paying more than would be appropriate. In considering dispensation requests, the tribunal should focus on whether the tenants were prejudiced in either respect by the failure of the landlord to comply with the consultation requirements. The tribunal has power to grant dispensation on such terms as it thinks fit, provided that any such terms are appropriate in their nature and their effect. Where a landlord has failed to comply with the consultation requirements there may often be a dispute as to whether the tenants would suffer if an unconditional dispensation was granted.

4.5. Relevant prejudice means whether non-compliance with the requirements has led the landlord to incur an unreasonable amount of costs or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard; in other words whether the non-compliance has in that sense caused prejudice to the

tenant. Insofar as the tenants will suffer relevant prejudice, the tribunal should, in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed to compensate the tenants fully for that prejudice.

4.6. In *Daejan Investments Ltd v Benson* Lord Neuberger said at [44]: "Given that the purpose of the [consultation] 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 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 requirement"* (emphasis added).

4.7. At [45] Lord Neuberger said: *"in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's 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."*

4.8. At [46] Lord Neuberger said: *"I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the requirements. That view could only be justified on the grounds that adherence to the requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. The requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above."*

4.9. Lord Neuberger went on at [71] to say: *"In so far as the tenants will suffer relevant prejudice as a result of the landlord's failure, the LVT should, at least in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice. That outcome seems fair on the face of it, as the tenants will be in the same position as if the requirements have been satisfied, and they will not be getting something of a windfall."*

4.10. The prejudice the tenants would suffer if unconditional dispensation is granted is qualified in that it must be 'relevant'. At [65] Lord Neuberger said: *"(I add the word "relevantly", because the tenants can always contend that they will suffer a disadvantage if a dispensation is accorded; however, as explained above, the only disadvantage of which they could legitimately complain is one which they would not have suffered if the requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted.)"*

4.11. It follows that "relevant prejudice" actually means "financial prejudice". It is a disadvantage which the tenants would not have suffered if the requirements had been fully complied with in respect of (i) paying for inappropriate works or (ii) paying more than would be appropriate: see *Benson* at [44]. Lord Wilson explained Lord Neuberger's judgment another way at [102]: it is *"whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant"*.

4.12. The factual burden of identifying some relevant prejudice that they would or might have suffered is on the tenants: see *Benson* at [67]. The tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it: see *Benson* at [69]. To assist them, the tenants have *"the added benefit of hindsight… and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord"*: see *Benson* at [69].

4.13. In *Jastrzembski v Westminster City Council* [2013] UKUT 0284 the Upper Tribunal (Lands Chamber) summarised the approach at [51] of its decision as follows:

> *"51. In determining whether there should be dispensation of the consultation requirements, the principles that an LVT needs to take into account following the decision of the United Kingdom Supreme Court in Daejan Investments Ltd v Benson & Ors [2013] 1 WLR 854 are:*

(1) whether, and if so to what extent, the tenant would relevantly suffer if an unconditional dispensation was granted. The word relevantly in this context refers to a disadvantage that the tenant would not have suffered if the consultation requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted;
(2) the factual burden is on the tenant to identify any relevant prejudice which he claims he would or might have suffered;
(3) once the tenant has shown a credible case for prejudice, the LVT should look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice;
(4) that it is not sensible or convenient to distinguish between a serious failing and a technical, minor or excusable oversight, save in relation to the prejudice it causes. The gravity of the landlord's failure to comply, the degree of its culpability, the nature of the landlord and the financial consequences of its failure to comply are not relevant considerations for the tribunal per se; their relevance will depend upon the prejudice which each such factor causes.
(5) that the tribunal could grant dispensation on such terms as it thought fit, providing that they were appropriate in their nature and effect, including terms as to costs."

4.14. The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice (see *Marshall v Northumberland & Durham Property Trust* [2022] UKUT 92 (LC) at [62]). The only prejudice which is relevant is prejudice as a result of the failure to comply with the consultation requirements: it is not the role of the Tribunal when considering a dispensation application to penalise the landlord for other aspects of its conduct (see *Daejan Investments v Benson and Others* [2013] UKSC 14 at [65]; *Holding & Management (Solitaire) v Leaseholders of Sovereign View* [2023] UKUT 174 (LC) at [13] and [22]).

5. OBJECTIONS

5.1. Several leaseholders are actively participating in these proceedings and object to dispensation on various grounds. The following is a summary of what appear to the Applicant to be the core objections and its response to them. Whilst the Applicant accepts the Respondents have other complaints, the issue of prejudice is "front and centre" and so that is what is addressed.

Clare Barnard

5.2. Ms Barnard alleges prejudice to the Respondents as a result of the Applicant's inability to consult. This is set out in §15 of her statement of case **[166]**. The essence of her objection appears to be that the Applicant entered into a three-year agreement with Protector, rather than an agreement from year-to-year. However, as Ms Barnard observes at §6 of her statement of case **[164]**, this was always the stated intention of the Applicant in the Notice of Intention **[129]**.

5.3. At §22 of her statement of case, Ms Barnard then criticises the decision to enter into a three-year contract with Protector *"when the market is indicating that prices are likely to fall in this period."* There is no evidence to support this statement. No expert evidence has been led by the Respondents on the state of the market.

5.4. Furthermore, the Respondents also variously allege that other London Boroughs have entered into one-year contracts with Protector but there is no evidence offered in support of this. Indeed, there is also no narrative

Brendan O'Brien

5.5. Mr O'Brien has not submitted a statement of case or a witness statement. However, he does state within his documentation that the Applicant should not be granted dispensation (see final paragraph at **[194]**).

Stephen Shaw

5.6. Mr Shaw addresses the issue of prejudice in one paragraph in his statement at **[318]**. Like the other Respondents, he suggests that if the Applicant had taken a one-year contract with Protector it would mean they would not have suffered prejudice. However, there is simply no evidence to support this assertion.

Neil Martindale

5.7. Mr Martindale says at paragraph 11 on **[334]**:

> *Grant on Terms: It is NOT simply a matter of the Tribunal deciding whether or not any prejudice has been caused to respondents by the applicant's failure to follow consultation regulations and if so by how much*

This statement is incorrect for the reasons set out in this skeleton argument. The issue of any relevant prejudice suffered by the tenants is precisely what is in issue.

5.8. In the first paragraph on **[340]**, Mr Martindale says *LBS severely prejudiced all leaseholders by locking them in for THREE years, to prices taken from the insurer, under the weakest conditions imaginable.* However, as with similar allegations made by other Respondents, there is no evidence to support the claim that entering a three-year term with Protector has caused the tenants to suffer any financial prejudice.

5.9. Mr Martindale's other principal complaint is in relation to costs. In §§1-2 on **[355]** he says the Applicant ought not to be able to recover its costs of these proceedings through the service charge. The Applicant confirms that it does not intend to add the costs of these proceedings to the service charges of its leaseholders.

6. SUBMISSIONS

6.1. In the circumstances of this case and given that there was ultimately one bidder for the insurance contract, the Applicant had no choice but to enter into the agreement with

Protector. It is clear from the evidence of Mr Angel **[154]** that the state of the insurance market was such that entering into a three-year term meant the Applicant – and indeed the Respondents – had the security of cover for that period, and avoided the concomitant uncertainty that came with any shorter policy. In any event, the policy offered by Protector was for three years, not one.

6.2. The Respondents to this application have failed to demonstrate any relevant prejudice by the Applicant entering into the policy with Protector. Accordingly, if the Tribunal finds there was a failure to consult in accordance with Schedule 2 of the Regulations, it is invited to grant unconditional dispensation from any failure to follow the consultation procedure in Schedule 2 of the Regulations.

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