Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL (WALES)

LEASEHOLD VALUATION TRIBUNAL (WALES)

Reference: LVT/0041/11/19

In the Matter of: Caergynydd Road, Swansea

Applicant: The Council of the City and County of Swansea

Respondents: Leaseholders of Caergynydd Road Properties.

In the Matter of: An Application under the Landlord & Tenant Act 1985 - Section 20ZA.

Tribunal: Trefor Lloyd (Legal Chair)

DECISION

The Tribunal grants the Applicant's application under Section 20ZA of the Landlord & Tenant Act 1985 and dispenses with the requirements for the Applicant to comply or to have complied with the relevant consultation requirements under the Act and the Service Charges (Consultation Requirement) (Wales) Regulations 2004 in relation to the material qualifying works namely: repairs and cleaning down of fascia boards, soffits and rainwater goods, cleaning and repairing rainwater gullies (if required in respect of the above), carry out repairs to main structure of dwellings as necessary, hack off all projections and loose materials and prepare the wall surfaces required for the new insulated render system, apply insulated render system, renew windowsills, repair existing canopies and make good, clean down and repaint the steel stanchions, re-point and clean down the masonry dividing wall between the front entrances, fit new stainless steel powder coating two part meter boxes, external facilities work if required this may include (depending on the existing condition) repairs to boundary walls and fencing, paths, steps and handrails, ensuring there is a washing line and a paved area leading to it. The works are intended in respect of numbers 20, 22, 25, 28, 34, 36, 37, 43, 46, 47, 48, 52, 53, 54, 55, 61, 63, 66, 67, 70, 72, 79, 82, 85, 89, 93, 97, 98, 99, 102, 103, 105, 107, 112, 114, 116, 134, 146, 148, 150, 156, 162, 166, 170, 172, 174, 184 Caergynydd Road, Swansea.

The Tribunal is satisfied that it is reasonable to dispense with those consultation requirements on the facts of this case.

BACKGROUND

1. The matter relates to qualifying works as referred to above in respect of the aforementioned dwellings located in Caergynydd Road, Waunarlwydd, Swansea.

2. By way of an application dated the 8th November 2019 received by the Tribunal on the 11th November 2019, the Applicant seeks dispensation from the consultation requirements for qualifying works under Section 20 of the Landlord & Tenant Act 1985 ("the Act"). They are described in the application as:

   (1) Repairs and cleaning down of fascia boards, soffits and rainwater goods (if required).

   (2) Cleaning and repairing rainwater gullies (if required).

   (3) Carry out repairs to main structure of dwellings as necessary.

   (4) Hack off all projections and loose materials and prepare the wall surfaces required for the new insulated render system.

   (5) Apply insulated render system.

   (6) Renew windowsills.

   (7) Repair existing canopies and make good.

   (8) Clean down and repaint the steel stanchions.

   (9) Re-point and clean down the masonry dividing wall between the front entrances.

   (10) Fit new stainless steel powder coating two part meter boxes.

   (11) External facilities work if required- this may include (depending on the existing condition) repairs to boundary walls and fencing, paths, steps and handrails, ensuring there is a washing line and a paved area leading to it.

3. The application form and appendices indicate and confirm that an initial Section 20 consultation exercise was undertaken quite properly and as a result of which the contractor Jefferies Contractors Ltd ("Jefferies") was appointed following no representation from the Leaseholders. Work on the project was due to commence in October 2019. On Friday 13th September 2019 Jefferies emailed the Applicant to advise that there was an error in their costing which had only recently been discovered. This created a shortfall of £99,924.84. As a result the Applicant's procurement team was consulted for advice and contact was

made with Jefferies through the tender portal. Jefferies was required to submit its amended tender with the corrected costs.

4. On Wednesday the 18th September 2019 the contract was assessed on a price/quality basis, Jefferies was ranked first position. However, by adding the £99,924.84 onto its price it altered its ranking reducing it from first to second position. As a consequence Jefferies was no longer the winning contractor. Therefore, on the 19th September 2019 the second place contractor, who as a result of the additional costs by Jefferies, had become the first position contractor was asked if it would like to take on the contract and accepted. On Friday 20th September 2019 the procurement team re-wrote the contract award report and on the 1st October 2019 an amended third notice was sent to the Leaseholders informing them of the new contractors along with a letter of explanation, and notice of the dispensation claim. Copies of all sample correspondence were included within the application.

5. The application form further confirms that in the Applicant's view the change of contractor could be considered as a material change which requires a new Section 20 consultation, hence the application being made.

6. The Applicant's case is that another Section 20 consultation would be prejudicial to the Leaseholders as the work is due to commence immediately, and is required as backed up by independent surveys. In addition, a delay to the contract commencing would impact on the Applicant's ability to achieve the statutory deadline of December 2020 to comply with the Welsh Housing Quality Standard Requirements.

7. The Applicant concludes its application by stating that there is no prejudice to the Leaseholders by dispensing with the need for a further consultation because:

   (1) The Leaseholders contribution will not change and will remain the same as set out in the letter of the 12th September 2019.

   (2) The estimate provided in the letter of the 25th July 2019 (initial consultation) was not challenged during the Section 20 consultation.

   (3) The qualifying works are unchanged from the letter dated 4th September 2019 and were not opposed by the Leaseholders during the Section 20 consultation.

   (4) Any additional costs that arise by virtue of the circumstances referred to will be met by the Applicant despite the same being outside the Applicant's control.

THE LAW

8. The relevant primary legislation is to be found in sections 20 and 20ZA of the Act. Section 20ZA(1) to 20ZA(4) provides as follows:

20ZA (1) Where an application is made to the appropriate 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.

(2) In section 20 and this section -

"qualifying works" means works on a building or any other premises, and
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement -

(a) if it is an agreement of a description prescribed by the regulations, or
(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

9. Section 20(1) provides that, where the section applies to any qualifying works the relevant contribution of tenants is limited (in practice to £250) in accordance with section 20, and the material accompanying regulations, unless the consultation requirements have either (a) been complied with in relation to the works or (b) dispensed with in relation to the works by a Leasehold Valuation Tribunal.

10. The elements to the consultation required are prescribed by the Service Charges (Consultation Requirements) (Wales) Regulations 2004 ("the Regulations") and the Act but in broad terms, notice would be given to the tenants of the works and proposed costs, responses sought from the tenants within 30 days, the landlord would have regard to any responses, obtain estimates including from contractors nominated by the tenants, send out a second notice with details of at least two estimates and a summary of observations made to the landlord together with details of a second 30 day period for further observations to which the landlord must have regard before entering into the contract. This is of necessity a time consuming process.

11. The leading case on the question of whether a Leasehold Valuation Tribunal should grant a section 20(1)(b) dispensation under section 20ZA of the Act is the Supreme Court decision in **Daejan Investments Ltd. v. Benson [2013] 1 WLR 854**. The Court said 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 and, as such, the issue on which the tribunal 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 consultation requirements (Lord Neuberger in the leading judgment at paragraph 44). The dispensing jurisdiction is not a punitive or exemplary exercise. The consultation 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 (paragraph 46). The importance of real prejudice to the tenants flowing from the landlord's breach of the consultation requirements is the main, indeed normally the sole, question for the tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA(1) (paragraph 50). The tribunal has power to grant a dispensation on such terms as it thinks fit provided that any such terms are appropriate in their nature and their effect (paragraph 54).

12. It is for the tenants to identify some relevant prejudice that they would or might have suffered (paragraph 67) and further that once the tenants have shown a credible case for prejudice it is for the landlord then to rebut it (paragraph 68). It is also for the tenants to identify what it is they would have said if the consultation process had been implemented.

DECISION

13. The Tribunal must consider the question of the extent, if any, to which the Leaseholders are prejudiced by the failure of the landlord to comply with the applicable consultation requirements. All Leaseholders were invited to comment, and also if they so desire to become Respondents. None of the Leaseholders elected to become Respondents and there have been no representations from them in relation to this application.

14. In relation to the Lease of the properties, although there are some differences a number are identical and copies of the specimen clauses have been included with the application. These make it clear that the repairs and works proposed are the subject of a service charge.

15. Bearing in mind there have been no representations from any of the Leaseholders the Tribunal accepts the un-contradicted evidence of the Applicant. Further, bearing in mind all that is occurring is a change of contractor with the Leaseholders only being subjected to the same cost consequences as in the case of the prior consultation, which followed the appropriate procedure, and did not result in any representations being made, the Tribunal is satisfied that there is no prejudice to the Leaseholders as a result of dispensing with the requirements for consultation in all circumstances of this case.

Dated this 27th day of January 2020

Chairman