

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**

Case Number: CH1/00HH/LDC/2008/0010

Decision on an Application under Section 20ZA Landlord and Tenant Act 1985

Applicant: Ely Investments Limited

Respondent: Mr and Mrs T Clegg
Mr A D Mills
Mr J D Rees
Mr I A Swift

Premises: Castle Chambers 147 Union Street Torquay Devon TQ1 4BT

Date of Application: 14 March 2008

Date of Hearing: 26th March 2008

Appearances: Mr Tom Maloney Heliting Property Management Limited
Mr Huw Milner Midas On site contractor
Dan Metcalfe BBH Chartered Architects Project Architect
Mr Tim Clegg (for Flats 1 and 3) and as spokesman for Mr
Rees (Flat 4)
Mr Anthony Mills (Flat 2)
Mr Ian Swift (Flat 2)

Tribunal Members: Ms C A Rai LLB (Chairman)
Mr W Gater FRICS ACI Arb

Clerk; Mr T Pinker

Date of Decision: 4th April, 2008

DECISION

The Application and the proceedings

1. The Tribunal is asked to exercise its jurisdiction under section 20ZA of the Landlord and Tenant Act 1985 (“the Act”) to dispense with the consultation requirements of section 20 of the Act and the Service Charges (Consultation Requirements) (England) Regulations 2003 (“the Regulations”).
2. The Tribunal grants the Applicant dispensation from the consultation requirements in relation to the already completed works carried out to repair the broken section of the drains beneath part of the car park.
3. The Tribunal does not grant the Applicant dispensation from the consultation requirements in relation to the proposed works to repair the drains between the building and the repaired section.
4. The full reasons for the decision of the Tribunal are set out below.

Background

5. The application dated the 14th March 2008 was made on behalf of the Applicant’s Managing Agent Heliting Property Management Limited by Tom Maloney who represented the Applicant at the hearing.
6. Directions were issued by John McAllister on the 17th March 2008 and the hearing was scheduled to take place on the 26th March 2008 following the decision of the Tribunal office to dispense with the usual 21 day notice period on account of the apparent urgent nature of the proposed works.

The Inspection

7. Prior to the Hearing the Tribunal members and the clerk inspected the Premises. They were met on site by Mr Maloney, Mr Milner and Mr Metcalfe. None of the Respondents were in attendance.
8. The building comprising the Premises is a substantial stone building which is currently enveloped in scaffolding. It fronts Union Street; adjoins Trematon Road on

its eastern side and backs onto Magdalene Road at the rear which street is much lower in elevation so there is a steep bank at the rear of the property part of which has been excavated.

9. Works have recently been undertaken by the Applicant to extend the car park as part current conversion works to the building. The main contractors carried out a drainage survey which revealed that part of the drains serving the Premises had collapsed. The Tribunal members were told that untreated sewage was escaping and seeping into the surrounding ground (although on account of the gradient it would have run away from the actual building). No evidence of this was apparent from the inspection. A plan was produced to the Tribunal members on site (and later a copy was circulated to all parties as part of the Applicants hearing bundle). This plan indicated the approximate run of the foul drainage from the building (and the location of the manholes) until it connected into the mains drainage system apparently located in the rear street. According to Mr Metcalfe the South West Water drainage plans (copies of which were not produced at the hearing) showed that the mains connection is located under Magdalene Street but not immediately to the rear of the Premises.
10. The Tribunal were told that the building had formerly been used as a hospital. Part of it had been converted into the five flats in or about 2002. The Applicant recently obtained planning permission to convert the remainder of the building into a further 17 flats. The Applicant was seeking to vary the existing lease and relocate the allocated car parking spaces. The detail and nature of the proposed variation of the existing leases is not relevant to the current application but it was referred to in some of the correspondence that was produced to the Tribunal, and by both parties and the Applicant's witnesses, at the hearing.

The Hearing

11. Mr Maloney presented the Applicants Case. He distributed a written statement together with a written copy of a the evidence to be given by Mr Milner one of the Applicants two witnesses which was one of the 8 separate bundles numbered A1 – A8 to which he referred.
12. He explained that a CCTV survey was undertaken at the instigation of Midas Property Services (UK) Limited, who are the main contractors for the Applicant, and who are currently working on site and undertaking the conversion works.

13. This had revealed the collapse of a section of the mains drains serving the Premises. The blockage had prevented the CCTV camera from plotting the route of the drains beyond the blockage. The survey was abandoned. The blockage was subsequently cleared and at some time thereafter the broken section of drain was repaired. A second CCTV survey was thereafter successfully completed. No estimates of the costs in carrying out the repair were provided to the Respondents although at the Hearing they alleged that they had repeatedly requested this information. It would appear that works were carried out by the “on site” contractor at “contract rates”. Questioning from the Tribunal members revealed that the cost of the repair was apparently in the region of 1400 + VAT.
14. Further excavation works were carried out to locate the manhole covers in the vicinity of the deeper drain sections under the car park and adjacent bank.
15. The Respondents accepted that they had been kept informed of these works and investigations but questioned whether the repair works that had been carried out were urgent. It was not disputed that there had been a blockage and that once that was cleared the “drains flowed freely”.
16. The Applicant’s evidence was that repair works had to be undertaken swiftly once the broken drain was revealed because of the Health and Safety risk to all parties on site which included the Respondents in occupation and the workers on site. In addition raw sewage was seeping into the surrounding ground. It was conceded however that it was impossible to accurately assess how long ago the drain had failed. The Respondents had not been aware that there was a problem. No smell had emanated as a result. Although the surveyors suggested that the effluent could have “backed up”, it was stated by Mr Metcalfe that the drains flowed freely once the blockage was cleared. It was also suggested too that it was more economic to do the works immediately as the site had been excavated in part for the car park works. If the Applicant had adhered strictly to the consultation requirements the works would have been held up for three months and the car park would have had to have been made good and then excavated again increasing costs. No estimates appear to have been provided and all evidence as to the costs actually incurred was verbal, with the exception of the information in Mr Milner’s written statement. Mr Maloney however stated, in response to questions from the Applicants that the entire cost of repairing the drains should be shared only between the owners of the five existing flats. This is notwithstanding that Mr Metcalfe gave evidence that the works, to improve the

drainage between the broken section and the building , would enable the contractor to connect the new flats into the existing drainage.

17. The Respondents indicated that they believed that more information could have been provided to them by the Applicant. They were unconvinced that the repair works had been urgent. Without estimates as to costs it is impossible for them to analyse if the repair costs were economic. In addition whilst they accept that the Applicant has made an offer (although it is not clear if this still subsists) to bear entire costs of the drainage repairs, this was on a conditional basis. The Respondents felt that they had been put under pressure both in terms of timing and financially so that the applicant could progress the development of the property swiftly. They did not consider therefore that the consultation requirements should be dispensed with on the grounds of urgency.
18. Mr Huw Milner who is a Senior Quantity Surveyor employed by Midas Property Services (UK) Limited the main contractor said that the once it was discovered that effluent was seeping into the ground it was both urgent and necessary to repair the drain, on health and safety grounds to protect the residents (the Respondents) and the workers on site and also because of a potential risk of back up of effluent into the drainage system serving the existing flats. The second CCTV survey revealed numerous other problems in both sections of the drains either side of the section which had been repaired.
19. Mr Milner he was unable to indicate, other than in a general way, the costs of the repair or the estimated cost of the further works which the Applicant considered urgent and necessary.
20. When questioned on this point by the Respondents, Mr Maloney said that he was withdrawing from the application the repair works relating to the section of the drain between the repaired section and the mains connection. He said that the current application was now only in respect of the cost of the repair already carried out and the required repairs to the drains between the repaired section and the building. In response to further questioning from the Respondents both he and Mr Milner claimed that the urgency of the repairs was not just to facilitate the completion of the current works within the contractual time limits. Both he and Mr Milner stated the cost of the repair works were at an economic rate because the contractor was already on site; Furthermore the excavation works were part of the contract works and therefore not going to be charged back to the Respondents. However when pressed by further

questioning from the Respondents Mr Milner admitted the costs incurred, did include some costs relating to excavation.

21. When the tribunal asked why no estimates had been included in the bundles no clear response was given save that one estimate was found within bundle A5. It was however of no assistance to the Respondents or the Tribunal as it related to works to the section of drains between the collapsed section and the mains connection.
22. No evidence was given to the Tribunal by any of the parties as to whether any of the works beyond the initial repair have been commenced or are in the course of being undertaken.

Relevant law

23. Section 20ZA (1) of the Act states:-

“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, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.”

Under section 20ZA (4) the consultation requirements mean:-

“Requirements prescribed by regulations made by the Secretary of State. These are the Service Charges (Consultation Requirements) (England) Regulations 2003.

Under section 20 (3) “qualifying works” are defined as being “works” “to the costs of which the tenant by whom the service charge is payable may be required under the terms of his lease to contribute by the payment of such a charge”.

If the costs of any tenant’s contribution exceed the sum set out in section 6 of the Regulations) (which is currently £250) the Landlord must comply with the consultation requirements set out in Part 2 of Schedule 4 of the same Regulations.

In order to make a determination to dispense with some or all of the consultation requirements the Tribunal must be satisfied it is reasonable to do so.

Consideration of the facts and the law

24. The basis of the application seeking dispensation is set out in paragraph 3 of the application but at the hearing the Applicant applied for dispensation in relation to:-
- The repair works already carried out
 - The repair works which may have been started (although this was not entirely clear) to the drains between the repaired section and the building
 - The repair works to the section of drain between the repaired section and the mains

At the hearing the Applicant however withdrew its application in relation to the repair works to the latter section of the drain on the basis that the works were not urgent and that it would adhere to the consultation requirements.

25. The purpose of the Regulations is to ensure that there is proper and full consultation with lessees and that the whole process is transparent.
26. It appears to the Tribunal that the Applicant decided that it could not comply with the Regulations because of the alleged urgency of the initial repair works and then included all the other drainage works recommended in that “umbrella” – or perhaps did not consider them at all - and decided instead to rely upon a later application to the Tribunal, under section 20ZA, without due consideration of the 2003 Regulations.
27. The purpose of section 20ZA is not to provide a means for landlords to ignore the Regulations altogether and to seek dispensation afterwards. For the Tribunal to allow an application under this section, without evidence of any attempt on the part of an Applicant to comply with the Regulations would frustrate the purpose of the Act and the Regulations made under it.
28. There seems no apparent reason why full information regarding the costs of the works actually carried out could not have been provided even if this was done after the work was done. It seemed to be accepted that estimates of the costs of the other works required could have been provided and could still be provided. However no information had been provided prior to the hearing. The information provided to the Tribunal at the hearing was not of itself sufficient to comply with any of the requirements of the consultation regulations.

29. If it is accepted that the initial works to repair the broken drain were urgent, on the evidence given by Mr Metcalfe, the further works in respect of which the Applicant now wanted dispensation, are to *prevent* another emergency. Therefore it must follow that no emergency currently exists. It appears to be accepted by all the parties that no one can accurately assess how long the current drains will continue to function if the propose works are not carried out. However the CCTV survey does clearly reveal that the drains are in cracked and fractured. It also provides information as to the scope of the further works that may be required and offers a basis upon which the Landlord could follow the consultation requirements prior to the costs being incurred.

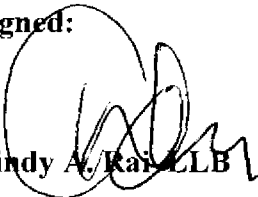
Findings of the Tribunal on the facts of the case

30. In relation to the works already undertaken to repair the collapsed drain the Tribunal accepts that on Health and Safety grounds there was a potential risk to the Respondents, and to others, if this repair had been delayed given the evidence produced as to the nature of the defect. It is not apparent why more transparent information with regard to the costs and nature of the work was not provided. Whilst it was suggested that carrying out the works promptly might have resulted in the achievement of cost savings it is impossible to analyse this suggestion, without any information as to the actual costs of the works and therefore this cannot be accepted as a ground for dispensation. On balance however whilst not convinced that the Applicant fully considered any of the consultation requirements the Tribunal accepts that the repair works carried out were sufficiently urgent to enable the Tribunal to dispense with the consultations requirements in relation to works carried out to repair the collapsed section of the drain and to unblock the obstruction and that it is reasonable to do so.
31. In relation the further work required to the drainage between the repaired section and the Building the Tribunal determines that on account of:-
- The lack of sufficient information as to the nature of the proposed works and whether any part of this work has already been undertaken;
 - The absence of any information as to the proper apportionment of the benefit to the Respondents and the Applicants development; and

- the absence of any estimates or any apparent attempt to cost the work;

it rejects the application for dispensation with the consultation requirements in relation to these works and considers that to grant a dispensation in such circumstances would undermine the purpose of the legislation and Regulations.

Signed:

A handwritten signature in black ink, appearing to read 'Cindy A. Kar', written over the printed name.

Cindy A. Kar LLB

Chairman

Dated: 4th April 2008