THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

Section 20ZA of The Landlord and Tenant Act 1985 (as amended) (Application to dispense with consultation requirements)

Case Number:	**CHI/O0ML/LDC/2009/0010**
Property:	**38 Osborne Villas, Hove, East Sussex, BN3 2RB**
Applicants :	**Peter George Webster and Helena Louise Webster**
Respondent :	**Graham Richard Whittington**
Date of Determination:	**12th August 2009**
Tribunal:	**Mr R T A Wilson LLB (Lawyer Chairman)** **Mr R Wilkey FRICS (Valuer Member)**
Date of the Tribunal's Decision:	**26th August 2009**

1. BACKGROUND

1.1 This is an application made by the Applicants pursuant to section 20ZA of the Landlord and Tenant Act 1985 (as amended) ("the Act") to dispense with the consultation requirements contained in Section 20 of the Act.

1.2 The work covered by this application was a programme of works of repair and redecoration to the front parapet of the top floor bay window of the property between July 2008 and January 2009 and involving expenditure of approximately £29,000, "The Works".

1.3 On 29th April 2009 the Tribunal gave directions that it intended to determine the matter on the basis only of written representations without an oral hearing unless it heard from either party objecting to this procedure.

1.4 Neither party had objected and the Applicants had submitted their statement of case together with accompanying papers in accordance with the directions issued by the Tribunal. The Respondent had failed to respond.

1.5 Paragraph 6 of the directions provided that if the Respondent wished to contest the application he must send to the Applicants and to the Tribunal, within 21 days of receipt of the Applicants' statement case, his own bundle of documents together

with a statement setting out his grounds of opposition. The Tribunal's papers contain no statement of case from the Respondent.

1.6 Accordingly, the Tribunal determined the matter on the written submissions of the Applicant alone and on the basis that the Respondent neither endorsed nor contested the application.

2. INSPECTION

The Tribunal inspected the subject property on the day of the hearing. 38 Osborne Villas is a mid-terrace, three-storey building built in about 1880 and recently converted into three self-contained flats. The Tribunal noted that the section of the front bay at roof level and adjacent parapet wall had been reconstructed and painted.

3 THE LAW

3.1 Section 20 of the Act limits the service charge contribution that lessees have to make towards "qualifying works" if the relevant consultation requirements have not been complied with or dispensed with by a Leasehold Valuation Tribunal.

3.1 Section 20ZA (2) of the Act defines "qualifying works" as works on a building or any other premises.

3.2 Regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations 2003 SI 1987 ("the Regulations") provide that if a lessee has to contribute more than £250 towards any qualifying works then if the landlord wishes to collect the entire costs of those works the landlord must either carry out consultation in accordance with Section 20 of the Act before those works are commenced, or obtain an order from the Tribunal dispensing with the consultation requirements.

3.3 The consultation requirements are set out in the Regulations and it is not proposed to set these out here.

3.4 Under section 20ZA (1) of the Act, the Tribunal is given discretion to dispense with the consultation requirements. This section provides:

Where an application is made to a Leasehold Valuation Tribunal for a determination to dispense with all or any consultation requirements in relation to any qualifying works or qualified long term agreement, the Tribunal may make the determination if satisfied that it is reasonable to dispense with those requirements.

3.5 The test is one of reasonableness. Is it reasonable in the circumstances of the case to dispense with all or any of the requirements? The decided cases have established that it is not necessarily the conduct of the landlord that has to be reasonable rather it is the outcome of making the order which has to be reasonable taking into account all the circumstances of the case.

4 THE EVIDENCE PRESENTED AT THE HEARING

The evidence submitted to the Tribunal consisted of the following documents:

4.1 Statement of case.

4.2 Surveyors report.

4.3 Witness statement of Mr P Webster.

4.4 Witness statement of Mr P Spark.

4.5 Summary of works and invoices.

4.6 Office copy documents and copy leases.

5 CONSIDERATION

5.1 In the opinion of the Tribunal "the Works" do constitute "qualifying works" within the meaning of the Act. As the contribution required from the Respondent pursuant to the service charge provisions of his lease exceeded the threshold of £250 there was an obligation on the Applicant under Regulation 6 to consult in accordance with the procedures set out in the Regulations.

5.2 The evidence put before us establishes: -

5.2.1 In July 2008, the front parapet on the top floor of the property collapsed. The fire brigade were called out to contain the damage and Brighton and Hove City Council, in due course, served a notice on the Applicants advising them that the property was dangerous.

5.2.2 The Applicants took prompt steps to ensure that the property was made safe. After the property had been secured, the Applicants notified the insurers and did what they could to establish that the damage was covered by the insurance policy. In due course the insurers declined to accept the claim on the basis that the damage was not covered under the policy. Thereafter the Applicants arranged for a local surveyor to instruct builders to quote for and carry out the works as soon as possible. Work commenced on or about the middle of October 2008 and was completed in January 2009.

5.2.3 Whilst the works were being carried out, the Applicant's builders discovered that there was dry rot in the timbers and window frames. The dry rot was attended to in the programme of works

5.2.4 The Applicants kept the Respondent informed during the progress of the work, but failed to consult with the Respondent as to the choice of builders and other professionals used by them in relation to the Work.

5.2.5 No statutory consultation took place, and very little communication took place between the Applicants and Respondent prior to the builders and professionals being instructed.

5.3 The Tribunal first considered the terms of the lease and in particular the repairing covenants contained therein. The lease places an obligation on the landlord to maintain the exterior of the property and in particular to repair and decorate the structure subject to receiving a one third contribution of the cost from the Respondent. The Tribunal was thus satisfied that the Applicants were obliged to carry out the Works and the Respondent to contribute his due proportion of the cost.

5.4 In the Applicants' statement of case it is contended that it was not possible for them to carry out the statutory consultation before the works were carried out and that had they done so the delay would have deteriorated the dangerous situation still further.

5.5 The Applicants further contend that in respect of the dry rot works carried out, it would have been unreasonable not to have carried out this work at the same time on the grounds that it would have delayed the matter further and would have been far more costly to return to these works at a later date.

5.6 The Applicants seek dispensation on the grounds that they acted as best they could in the circumstances and that dispensation would be reasonable in all the circumstances of the case.

5.7 The Tribunal reminded itself that the test of reasonableness did not apply to the conduct of the Applicants. Under the current legislation Parliament envisage that an order can be made even if it is found that the conduct of the landlord is unreasonable. The Tribunal emphasises this point because we are critical of the Applicants' failure to correctly apply the statutory procedure to what was after all a substantial programme of structural works, which could and should have been subject to consultation. The Tribunal records its dissatisfaction at the conduct of the Applicants in this respect.

5.8 The Tribunal noted that the collapse occurred on 16 July 2008, but it was not until the middle of October 2008 that the work commenced. During this time there had been correspondence with the insurers and other professionals. There is evidence that the Applicants engaged in some form of tendering but no evidence that the Respondent was given any say whatsoever as to the scope of the work or the choice of contractor. There is also no evidence that the Applicants sent any estimates to the Respondent.

5.9 It is not clear why the Applicant's failed to comply with the statutory consultation procedure in respect of the Works. Bearing in mind the lapse of time between the collapse and the start of the Works, there would have been time to carry out the statutory consultation procedure.

5.10 The Tribunal first directed its attention as to how the situation arose that the parapet apparently collapsed without warning. We have concluded that the situation probably arose partly because of the way that this part of the building was designed and constructed and partly because of water penetration over many years which would have caused the timbers to decay. On the face of it neither of these shortcomings would have become apparent without invasive investigation. The combination of a poor design coupled with water penetration over the years could reasonably be expected to lead eventually to a collapse of this kind. Short of exposing the area in question it would not have been apparent that there was a lack of stability.

5.11 There was no evidence before the Tribunal of a failure on the part of the Applicants to carry out timely repair work to the building.

5.12 The Tribunal formed the view that the Applicants did what they could to contain the damage and also made reasonable attempts to make an insurance claim. The papers indicate that two loss adjusters both concluded that the damage was not caused by subsidence or other insured risk.

5.13 Whilst the Tribunal is critical of the Applicants' failure to comply with the statutory consultation process, we have concluded that the failure to comply has not caused undue prejudice to the Respondent. Moreover we believe that had the Respondent been consulted the outcome would have been materially the same. The evidence before the Tribunal suggests that there was some form of tendering process covering the building contract. The fee charged by the architects for project management at 12% of the overall cost is in line with what we would expect for a project of this kind. We are also satisfied that the costs of the structural engineers were reasonable bearing in mind the magnitude of the problem.

6. THE DECISION

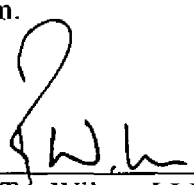
6.1 The Tribunal is satisfied that the collapse of the front parapet on the top floor of the property was a serious incident which could not have been foreseen. It is aware from its collective knowledge and experience of the locality that properties of this type in the Brighton and Hove area are prone to such incidents. But, once the initial damage had been contained, it should have been possible for the Applicants to have implemented and waited for the section 20 procedures to take their course before carrying out the Works. However when the outbreak of dry rot had been identified, immediate action was necessary to avoid extensive further damage which may well have occurred if there had been any delay. In the Tribunals experience such outbreaks as these must be dealt with speedily and comprehensively rather than on a piecemeal basis because of the very considerable speed with which the fungus that causes dry rot can sometimes spread. It is thus understandable that the Applicants should proceed with the dry rot works straight away.

6.2 The Tribunal notes that a tendering process of some sort was carried out and that reputable builders and professionals where commissioned to carry out the works.

6.3 Notwithstanding the shortcomings in the conduct of the Applicants the Tribunal reminded itself that the Respondent did not contest the application. Secondly, and of particular importance, is that no evidence was before it to suggest that the Respondent has suffered any prejudice as a result of the failure to consult. The Tribunal considers that the scope of work was clear and that the works carried out were self-contained and that no more was done than was necessary. Taking all the circumstances into account and for the reasons stated above, the Tribunal is satisfied that it is fair and reasonable in all the circumstances for it to grant dispensation from the requirements of section 20 (1) of the Act in respect of all the Works.

6.4 The Tribunal makes it clear that this dispensation relates solely to the requirement that would otherwise exist to carry out the procedures in accordance with section 20

of the Act. It does not prevent an application being made by the Respondent under section 27A of the Act to deal with the resultant service charges. It simply removes the cap on the recoverable service charges that section 20 would otherwise have placed upon them.

Chairman 

RTA Wilson LLB

Date 26th August 2009