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THE RESIDENTAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 20ZA OF THE LANDLORD AND TENANT ACT 1985.

Date: 15/11/2012

Tribunal: Mrs J F Brownhill MA

Mr M Ayres FRICS

Mr S Fitton

PROPERTY: Flats 1-24 The Clock Tower, Huckley Field, Abbeymead, Gloucester, GL4 5SX

Applicant: The Clock Tower (Gloucester) Management Company Limited. Represented by Cotswold Property Management Services.

Respondents: The Lessees

1 This is an application made under section 20ZA of the Landlord and Tenant Act 1985 ('the Act') for dispensation from the consultation requirements set out in section 20 of the Act in relation to costs which it is proposed are incurred by the Applicant.

2 The Tribunal had the benefit of inspecting the property on 15/11/2012 followed by a hearing at the Hallmark Hotel, Matson Lane, Gloucester. The Tribunal were assisted by Ms McDougall and her associate Mr Elliot on behalf of the Applicant. Various leaseholders of the property and a number of members of the public attended the hearing.

Section 20ZA

3 Section 20ZA of the Act provides:

" (1) 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.

(2) In section 20, and this section 'qualifying works' means works on a building or any other premises. '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 that twelve months."

The Property and the lease

4 The Clock Tower Huckley Field, Abbeymead, Gloucester, GL4 5SX (hereinafter referred to as 'the property') consists of 24 flats spread over a development consisting of a converted hospital building (built circa 1835) of a brick construction and a newly built attached extension. The Tribunal understand that the development was completed in or around 2006/2007.

5 The 24 flats within the development are let on leases. The Tribunal have seen a blank pro-forma lease and also a signed copy of a lease relating to plot 11. Of particular note are the following clauses:

a. 1.1.20 The 'retained parts' means the parts of the Estate other than

1.1.20.1 the flat and the car parking space; and

1.1.20.2 the other flats and the car parking spaces included in the leases of the other flats,

Including, without prejudice to the generality of the foregoing, [the roofs and roof space] the foundations and all external and structural or load bearing walls, columns, beams, joists, floor slabs and supports of the Buildings and such other parts of the Building as are not included in the flat and the car parking space and are not and would not be included in the premises demised by the leases of the other flats if let on the same terms as this lease."

b. 4.1 The landlord covenants with the lessee to observe and perform the requirements of Schedule 6 save that whilst the Management Company is obliged to undertake the obligations contained in paragraph 6-2 of Schedule 6 (pursuant to clause 4.2.1 below) the landlord shall have no liability under that paragraph .....

c. 4.2 The Management Company covenants with the Landlord and the lessee to observe on behalf of the landlord (save as those which the landlord shall notify the Management Company in writing that it shall undertake) the obligations of the landlord set out in Schedule 6 paragraph 6-2 and the provisions of Schedule 6 paragraph 6-2.2 shall apply to the Management Company to the same extent as they apply to the landlord.

d. Schedule 1; the expression the 'flat' includes

1-1.1 the floor and ceiling finishes..... but not any other part of the floor slabs and ceiling slabs that bound the flat or where the horizontal divisions of the Building are beams or joists

1-1.1 the floor and ceiling finishes..... up to the level of the underside of the joists or beams on which the part of the Building above the dwelling rests and down to the upper side of the joists and beams on which the dwelling rests..... **[the signed lease the Tribunal have seen does not include this second version of clause 1-1.1]**

but excludes the roof... the foundations and all external, structural or load bearing walls, columns, beams, joists, floor slabs and supports of the Building and any conduits that do not exclusively serve the property.

e. Schedule 6 clause 6-2.1 Provision of services. If the lessee pays the service charge and observes his obligations under this lease, the landlord must use his reasonable endeavours to provide the Services (as listed at the date of this Lease in Schedule 7 paragraph 7-3 and subject to the provisions of paragraph 6-2.3 below).

f. Schedule 7 clause 7-3.1 the services are repairing and whenever the Landlord regards it as necessary in order to repair, replacing or renewing the Retained parts and the car parking spaces on the Estate whether or not included in this lease or in the lease of any Other Flat.

Factual background

6 In or around August 2012, part of the floor in flat 7 suddenly sank by 4-5cm. Flat 7 is a two bedroom flat on the ground floor and within the original converted part of the development. It has its own entrance. There are in total four flats on the ground floor of the converted building (the old hospital); flats, 7, 8, 14 and 23. Flats 7 and 23 have their own external entrances and it is understood are mirror images of each other. Flats 8 and 14 are also two bedroom flats but are spread over two floors and their respective entrances are through the communal entrance to the converted building. Such communal entrance on the ground floor consists of a hall and staircase.

Inspection

7 The Tribunal inspected the property on the 15/11/2012 and were able to see inside flat 7, where the floor has been substantially taken up in the living room/ kitchen area, and a smaller area of flooring has been taken up in one of the bedrooms in the flat. It is clear that the floor joists supporting the floor to flat 7 have rotted and failed in some areas and this in turn has caused the floor to sink in the kitchen/living room as well as in one part of one of the bedrooms. This sinking is most visible at the wall dividing the two rooms (the kitchen/ living room and the bedroom), and the bay window area and has caused some distortion to the stud partition wall dividing those two rooms and some of the kitchen units. The cause of this failure of the joists is more particularly set out in the report of Mr Bell of Easton Bevins Chartered Building Surveyors dated September 2012. The detail of that report in this judgment is not reproduced in this judgment.

8 The Applicant understandably fears that if this failure of the floor joists has occurred under flat 7, then there may be a similar situation developing with the three other ground floor flats within the converted part of the building. It is thought that the communal ground floor areas within the converted part of the development may be of a solid construction and

therefore not affected. The Applicant wishes to undertake further work using a building contractor and surveyor to investigate this and to enable it, if appropriate, to submit a claim for remedial works under a guarantee which operates in respect of the property.

9 The Applicants and the owners of flat 7 had, prior to making this application, contacted the guarantors who have accepted that the required works fall within the terms of the guarantee in that they involve works to the 'retained' or common parts. There is, the Tribunal understand, some discussion as to the method of repair to be carried out under the guarantee. A loss adjuster/ surveyor from the guarantor attended at the property on 12/11/2012 and inspected inside flat 7. His conclusions are not yet known. The guarantors have indicated that an excess of 24 x £1,146 = £27,504 is payable. It is not for the Tribunal, under this application, to comment on or make findings about whether that is a correct construction of the terms of the guarantee.

The dispensation sought

10 The Applicants seek dispensation from the all of the consultation requirements in relation to:

a. The costs of the surveyors reports and associated works ('the surveyor's costs');

i. During the course of the hearing Ms McDougall explained that these costs could be broken down as follows:

1. Cost of the September 2012 surveyor's report surveyor (Mr Bell at Easton Bevins) being in the region of £1,600. This sum had initially been paid by the owners of flat 7, but this would be sought to be recovered by the owners from the Applicant;

2. Costs of further investigatory work by the surveyor Mr Bell at Easton Bevins, estimated to be in the region of £7,000 to £8,000 plus VAT. In his email of 02/10/2012 Mr Bell stated such figure included the work of a builder, tiler and carpet fitter and for his visits to site to record condition and assemble a report. Initially it appeared that

this estimate related to investigatory work to be undertaken to the other areas of the ground floor of the converted building, including the 3 other ground floor flats. However during the course of the hearing it transpired that this estimated cost also covered the cost of a second report undertaken by the surveyors to flat 7. Such second report, the November 2012 report, having already been undertaken, a copy appeared within the hearing bundle.

a. The estimated figure of £7,000 to £8,000 had been calculated on the basis of an hourly rate of £80 plus VAT, and a day rate from a building contractor JC Lloyd, who had been brought in by the surveyor.

b. Ms McDougall stated that the guarantors had stated that the guarantee did not cover the costs of a surveyor or expert preparing for a claim to be submitted under the guarantee. So the costs of this would need to be sought through the service charge.

b. The costs of the excess payable under the guarantee. Indicated by the guarantors as being £27,504.

It is to be noted that the costs of the substantial works of repair/ improvement were not considered within the application, as they would be completed under the guarantee.

The hearing

11 At the hearing Ms McDougal for the Applicants explained that the urgency which formed the basis of the application under section 20ZA of the Act arose as a result of the fact that under the terms of the guarantee any loss of rent claimed was limited to a period of up to 26 weeks. Flat 7 had been tenanted, and that tenant had now moved out, leaving the lessee of flat 7 with a loss of income. Ms McDougall explained that it was her view that the Applicant would end up bearing the cost of any additional loss of rent claim beyond 26 weeks.

However she emphasised that this was '..up in the air..' and that the Applicant was '..looking at other options which might be available."

12 During the hearing Ms McDougall accepted that Mr Bell, the Chartered Surveyor did not indicate that there was any imminent danger in relation to the floors of the other ground floor flats, though she did point out that the floor in flat 7 had dropped quite suddenly and at present they just did not know the position with the floors of the other ground floor flats. Ms McDougall explained that the Applicant wished to make one claim in relation to the whole of the ground floor of the building so that they would only need to pay one excess. This was later emphasised by Ms Price, one of the directors of the Applicant.

13 Ms McDougall stated that she had got other building surveyors quotes but the Tribunal were not given any further details or shown copies of these. Ms McDougall expressed her view that the guarantee/insurance excess did not amount to 'qualifying works' under section 20ZA(2), and asked the Tribunal to reach a conclusion on this. When asked about her view in relation to the surveyors costs, Ms McDougall again appeared to state that she was not sure if these were 'qualifying works' under section 20ZA(2). Ms McDougall explained that Mr Bell had brought in JC Lloyd, the building contractors, to carry out the work to remove parts of the floor in flat 7 and that they had been paid on a day work basis. Ms McDougall accepted that there had been no consultation about this choice of contractor, though she added that her company was familiar with JC Lloyd having used them on other schemes, but that in this instance it was Mr Bell who had brought them into the project.

14 A number of other leaseholders in attendance spoke at the hearing. Without setting out verbatim the detail of what was said, the following is intended by way of summary only:

a. Mr Gresswell (leaseholder of flat 19) felt that the flats were currently blighted and none of the leaseholders could offer their flats for sale;

b. Mr Dunne (leaseholder – together with his wife - of flat 8, a ground floor flat in the converted building) explained that his flat had been on the market but because of 'all this' he had taken if off the market for the time being. He emphasised that they

wanted a resolution. He also said that he thought that there was a problem with the floor in his flat as well.

c. Mr Ditomaso (leaseholder – together with his wife - of flat 22) explained that he had raised concerns previously with Cotswold Property Management Services about the surveyor's estimate and the level of the surveyor's fees. In particular he explained he had spoken informally to a friend who indicated that a figure in the region of £3,000 would be a more appropriate cost in relation to these works. He asked why the Applicant was just going to accept the estimate of £8,000 and indicated that in his view a fixed price would surely be more appropriate.

d. Ms Watt (leaseholder of flat 23, a ground floor flat within the converted building) again indicated concern at the level of the estimate and the surveyors fees being suggested and asked who was project managing the work. She also explained that as a ground floor leaseholder, the surveyor had not sought to contact her to look at what type of floor coverings she had in her flat, and that she had herself already flagged up there was a problem with the floor of her flat in August 2012. She described being able to feel her floor giving.

The Tribunal's decision

15 The Tribunal were asked to reach a conclusion as to whether the application concerned qualifying works within the meaning of section 20ZA(2) of the Act. The Tribunal noted that the Applicants had indicated on their application form that the application concerned qualifying works.

16 The Tribunal concluded that the guarantee excess which would, in due course, apparently become payable did not fall within the definition of qualifying works as contained in section 20ZA(2) of the Act. Payment of an excess due under a contract of guarantee, does not amount, in the Tribunal's view, to works on a building or any other premises. While on these facts it is right to say that it is envisaged that the claim under the guarantee will result in works being done to the building, the payment of the excess is not itself payment for those works. It does not vary according to the extent, precise scope or specification of the works done or the manner of repair or improvement.

17 Even if these were found to be 'qualifying works', it has no impact on the outcome of the application before us, as the Tribunal would not, in any event, give dispensation under section 20ZA of the Act for the reasons set out below.

18 In relation to the costs of the surveyor's reports and investigations these would, in the Tribunal's view, fall within the definition of 'qualifying works' under section 20ZA(2) of the Act. The surveyor's costs included the costs of physically taking up the floor and examining the joists and the building in the relevant respect. In that regard they were 'works' to the building. The costs would vary depending on the type and extent of work done and the methods used as well as presumably what was found in each area. Further the Tribunal was of the view that such taking up of the floor, examination of the joists and structure of the floor were an integral part of determining what works of repair would/should be undertaken, and so could be said to form part of the works of repair/ renewal.

19 The Tribunal may grant dispensation from consultation requirements it is satisfied that it is reasonable to do so. In assessing this, the Tribunal should disregard the financial consequences (for both the landlord and the tenant) of granting or refusing dispensation: Daejan Investments v Benson [2011] EWCA Civ 38. The Applicant's case for dispensation principally arose, as Ms McDougall herself explicitly stated, because of the desire to make one claim under the guarantee (so the excess was only paid once) and the perceived risk of a loss of rent claim exceeding that covered by the guarantee. In the Tribunal's view these amounted to the financial consequences of granting or refusing dispensation and so should therefore be ignored.

20 The Tribunal noted that the Applicant had already incurred the costs of the November 2012 report from Mr Bell. That report was said to form part of the original £8,000 plus VAT estimate. The November 2012 report tackles the issue of the type of repair to be undertaken – i.e. patch repair with additional ventilation or installation of a new solid floor. There was no significant urgency in relation to the obtaining of that report. The costs of the initial September 2012 report, being £1,600, would fall within the relevant £250 per leaseholder cap. In any event, these matters amounted to financial considerations or consequences arising from the grant or refusal of dispensation.

21 While the Tribunal noted that the Applicant was a company operated by the leaseholders themselves this did not alter our view as to the substantive merits of the application. The Tribunal were of the view that there would be significant prejudice caused to the lessees if dispensation were to be granted. The effect of dispensation would be to substantially deprive the lessees of their right to be included in the decision making process concerning the surveyor's costs, and that this would result in genuine prejudice.

22 In particular the Tribunal noted that a number of the leaseholders were concerned about the estimated costs of the surveyor's works and report. While Ms McDougall said that she had obtained other quotes from different surveyors in relation to the work and reports in question, these were not produced to the Tribunal and we were not given any further details.

23 Ms McDougall and the Applicant were proposing to instruct the surveyors to carry out the required work (and produce the reports) on the basis of an hourly rate. The estimated cost included provision for payment at a daily rate of building contractors brought in by the surveyors. Mr Ditomaso (leaseholder of flat 22) specifically queried not only the total amount of the estimate but also the fact that the relevant work was going to be done under an hourly rate/ daily rate price, as opposed to a fixed price. This was particularly relevant in the circumstances given the work already carried out to flat 7 and the knowledge obtained as to the condition of the joists etc. there, and the likelihood that the manner of construction would be consistent across all the flats on the ground floor. This is something which one would expect the consultation process to cover; so that the quotations obtained could be challenged and investigated, and nominations could be made by individual leaseholders. The Applicant would be under a duty to have regard to any observations made in relation to the proposed works.

24 The Tribunal noted that neither had there been any consultation about the use of the building contractors JC L LOYD and their daily rate, such costs were said to form part of the surveyor's costs. Cotswold Property Management Services indicated that the building

contractors had merely been brought in by Mr Bell , though they were familiar with them from other schemes.

25 The Tribunal have also considered whether there was any other urgency or emergency which would inform our view in relation to dispensation. While it is the case that the floor in flat 7 dropped suddenly, and it could not be known when (or if) this might occur in the other areas of the ground floor within the converted building, it was very clear from the language used by the surveyor in his reports that the risk was not of an imminent collapse. The Tribunal specifically noted (emphasis added):

- At page 5 of the September 2012 report the surveyor states: "It would be **prudent** to undertake further investigation elsewhere in the building **to establish whether** similar conditions of poor ventilation and poor design are leading to **or likely to lead to** decay and failure."
- In his email of 25/09/2012 the surveyor stated "In addressing this matter the management company might well **find it cost effective** to confirm the scale of the problem as a whole by limited investigation of other flats and by removal of more of the flooring in this flat. The excess applicable to the works would then be easier to accept."
- Page [A45] of the hearing bundle was a letter from Cotswold Property Management Services dated 02/11/2012 in which it was stated "At present it has only been identified that the joists have failed in one flat. Due to the preliminary investigations undertaken by Mr Bell, it is envisaged that a **similar defect could affect** the other three flats on the ground floor and whilst **they may not be at the stage where the floor is in imminent danger of collapse**, it seems sensible to establish whether there is a similar problem, so that we might carry out remedial work to all properties affected under a single insurance claim."
- Page [A05] of the hearing bundle, letter of 20/08/2012 from Mr Bell in relation to flat 7 "I have concluded that the **flat is safe to occupy for a limited period** but that the necessary investigation in both bedroom and living room will make the flat difficult to occupy whilst the damage that has already occurred is affecting the practical use of the kitchen area."

26 Whilst it is clear that the investigations and ultimately the required work should be carried out in a timely fashion, there is no sufficient urgency or an emergency type situation such as in the Tribunal's view would justify dispensation of the consultation requirements. The

necessary investigations can be completed after consultation and if appropriate a single claim under the guarantee, for the whole of the ground floor of the converted building can then be submitted. The Tribunal noted that in their letter of 02/11/2012 Cotswold Property Management Services refer to a three month phased consultation process.

Conclusion

27 The Tribunal are not satisfied that it is reasonable to dispense with the consultation requirements, and therefore the application under section 20ZA of the Act is refused.

28 The Tribunal should point out however that we have only considered whether or not it is reasonable to dispense with the consultation requirements and this does not give or imply any judgment about the reasonableness of the works or the costs.

Signed .....

Joanna Brownhill

Dated: 26/11/2012.