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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UD/LDC/2013/0050**
Property	:	**71 Mount Pleasant Road, Hastings, East Sussex TN34 3ST**
Applicant	:	**Brear Developments Limited**
Representative	:	**Dawson, Harden & Tanton**
Respondent	:	**Miss D. Smith (GFF)** **Mr. A. E. Rae (FFF)** **Mr. S. Christie (2FF)**
Type of Application	:	**Section 20ZA of the Landlord and Tenant Act 1985 (as amended)**
Tribunal Members	:	**Mr. R. A. Wilkey (Valuer/Chairman)** **Judge D. Dovar (Lawyer member)**
Date and venue of Hearing	:	**Monday 21st October 2013** **Bexhill Town Hall, Bexhill-on-Sea East Sussex**
Date of Decision	:	**Tuesday, 29 October 2013**

DECISION

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1. The Tribunal determines to dispense with the consultation requirements contained in Sch.4 Part 2 paragraphs 8-13 of the Service Charges (Consultation Requirements)(England) Regulations 2003 and the Section 20 procedure in relation to the qualifying works to the roof of the property.

INTRODUCTION

2. This is an application by the freeholders of the block, in accordance with S.20ZA of the Landlord & Tenant Act 1985, for dispensation of all or any of the consultation requirements in respect of qualifying works.

THE LAW

3. The statutory provisions primarily relevant to this application are to be found in S.20ZA of the Landlord & Tenant Act 1985 as amended (the Act). The Tribunal has of course had regard to the whole of the relevant sections of the Act and the appropriate regulations or statutory instruments when making its decision, but here sets out a sufficient extract or summary from each to assist the parties in reading this decision.

4. S.20 of the Act, and regulations made thereunder, provides that where there are qualifying works, the relevant contributions of tenants are limited unless the consultation requirements have been either complied with or dispensed with by the determination of a First Tier Tribunal. In the absence of any required consultation, the limit on recovery is £250 per lessee in respect of qualifying works.

5. The definitions of the various terms used within S.20 e.g. consultation reports, qualifying works etc., are set out in that Section and in S 20ZA.

6. In order for the specified consultation requirements to be necessary, the relevant costs of the qualifying works have to exceed an appropriate amount which is set by Regulation and at the date of the application is £250 per lessee.

7. Details of the consultation requirements are contained within a statutory instrument entitled Service Charges (Consultation Requirements) (England) Regulations 2003, SI2003/1987. These requirements include amongst other things a formal notice procedure, obtaining estimates and provisions whereby a lessee may make comments about the proposed work and nominate a contractor.

8. S.20ZA provides that a First Tier Tribunal may dispense with all or any of the consultation requirements if it is satisfied that it is reasonable to dispense with them. There is no specific requirement for the work to be identified as urgent or special in any way. It is simply the test of reasonableness for dispensation that has to be applied (subsection (1)).

9. As regards qualifying works, the recent High Court decision of Phillips v Francis[2012] EWHC 3650 (Ch) has interpreted the financial limit as applying to all qualifying works carried out in each service charge consultation period.

10. A lessor may ask a Tribunal for a determination to dispense with all or any of the consultation requirements and the Tribunal may make the determination if it is satisfied that it is reasonable to dispense with the requirements (section 20ZA) The Supreme Court has recently given guidance on how the Tribunal should approach the exercise of this discretion: Daejan Investments Ltd. v Benson et al [2013] UKSC 14. The Tribunal should focus on the extent, if any, to which the lessee has been prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the lessor to comply with the regulations. No distinction should be drawn between serious or minor failings save in relation to the prejudice caused. Dispensation may be granted on terms. Lessees must show a credible case on prejudice, and what they would have said if the consultation requirements had been met, but their arguments will be viewed sympathetically, and once a credible case for prejudice is shown, it will be for the Lessor to rebut it.

EXTENT OF PROPOSED WORK

11. The work involves repairs to the parapet gutter at the edge of the front main roof slope. Defects are allowing water penetration into the interior of the top floor flat

DESCRIPTION AND INSPECTION

12. The building comprises a mid terrace house on three floors which has been converted into three self-contained flats. It was probably constructed just over 100 years ago and has frontage to a busy local traffic route. Many nearby properties are of similar age and style but there is some infilling development.

13. The main roof is pitched and has been recovered with interlocking concrete tiles. The front slope meets a parapet wall and there is a lead lined valley gutter at this junction. Scaffolding is currently in place for the full height at the front of the property.

14. The Tribunal inspected the property prior to the Hearing and were met by Mr. Earwaker of Dawson, Harden and Tanton (Managing Agent) and Mr. Gasson of South East Building Company Ltd. together with his son and a colleague. None of the lessees were present at the inspection.

15. With the assistance of the building contractor and the scaffolding the Members of the Tribunal were able to gain access to examine the front parapet and gutter. Although some form of waterproof compound has recently been applied to the lead gutter surface, it is apparent that the existing leadwork is to an indifferent standard and that there are splits and defects. Patch repairs have been carried out in the past.

16. An inspection was made of the front room in the top flat which is immediately below the roof area mentioned above. Whilst there are no significant visible defects to the front part of the ceiling in this room, the Tribunal noted a stain in the front corner of the room, a crack to the ceiling and that a bowl to collect water had been placed on a sofa.

THE LEASES

17. The Applicant has provided a copy of the lease of each of the flats and it is for a term of 99 years from 24th June 1988.

18. The Landlord covenants to maintain and keep the premises (other than the parts thereof comprised and referred to in paragraphs (d) and (f) of Clause 5 hereof) ...in good and tenantable repair and condition....

19. The relevant part of Clause 5(d) of the lease states as follows:

That, (subject to contribution and payment as hereinbefore provided) The Lessor will maintain repair redecorate and renew (insured risks excepted):-

(i) The main structure and in particular the roof and chimney stacks foundations gutters and rain-water pipes of the building

20. The tenant covenants, amongst other things, to pay the proper and reasonable costs and expenses specified in the Fourth Schedule.

21. The costs expenses outgoings and matters toward which the Lessee must contribute are set out in the Fourth Schedule and include the expense of maintaining repairing redecorating and renewing:

(a) The main structure and in particular the roof foundations chimney stacks fences gutters and rainwater pipes of the building

22. The Tribunal has not interpreted the leases to determine whether or in what proportion a service charge may be levied on the tenant.

23. There were no matters raised by either of the parties in respect of the interpretation of the lease.

HEARING AND CONSIDERATION

24. A Hearing took place at Bexhill Town Hall, London Road, Bexhill-on-Sea commencing at 11.15. The parties who attended were the same as at the Inspection with the exception of Mr. Gasson's colleague

PRELIMINARY MATTERS

25. The Applicant had supplied a simple bundle of documents in response to Directions issued by the Tribunal on 25th September 2013. The bundle consisted of:

(a) The completed Application form and copies of the lease of each of the flats

(b) A copy of a letter dated 18th September sent to each of the leaseholders. This letter stated that, following an inspection by a contractor, it was found that "...a new lead valley or a repair to the current lead valley is necessary". The letter also stated that an application for dispensation from the Sec. 20 Consultation process would be made.

(c) A copy of a quotation dated 17 September 2013 from South East Building Contractors Ltd. for carrying out work at roof level around the front parapet wall for the sum of £2,600 excluding VAT.

26. Immediately prior to the Hearing, the Applicant gave to the Tribunal a copy of another estimate for carrying out the work. This was dated 25th September 2013 and was for the sum of £2,350 plus VAT but excluding the cost of scaffolding (which the quotation of 17th September 2013 had included). Mr. Earwaker also provided a copy of various emails to and from lessees.

27. No written communication had been received from the Respondents.

28. The Tribunal confirmed that the Application today is solely to dispense with the consultation requirements that would otherwise exist to carry out the procedures in accordance with S.20 of the Act. It does not prevent an application being made by the landlord or any of the tenants under S.27A of the Act to deal with the liability to pay the

resultant service charges. It simply removes the cap on the recoverable service charges that S.20 would otherwise have placed upon them.

THE HEARING

29. Mr. Earwaker addressed the Tribunal and explained that the tenant of the top flat had been complaining of water penetration for 6/7 months. Shortly after the initial complaint, he arranged for work to the trap hatch to be carried out by South East Building Co. Ltd. Unfortunately, this was not successful in stopping water penetration and matters came to a head on 11th September 2013 when Mr. Earwaker received an email from the agent for the lessee of the top flat which is sub-let. This email stated:

"We have not heard anything from the block manager in relation to fixing the roof. We came home today to find our sofa soaked completely through, not only just the top of the cushion but it is sopping wet underneath and through to the base of the sofa itself. This is really ridiculous especially as we are now coming into autumn. I can imagine this will not help the damp problem we continue to have in the flat either (where our bedroom is still coated in black mould and probably bad for our health"

30. On receipt of this information, Mr. Earwaker instructed South East Building Co to erect scaffolding at the front of the building in order to establish the cause of water penetration and ascertain the work required. This resulted in the quotation dated 17th September 2013

31. Mr. Earwaker wrote to each of the Lessees on 18th September advising them of the problem, that the Contractor had inspected and that "a new lead valley or a repair to the current lead valley is necessary" and that an application is being made to the First Tier Property Tribunal for special dispensation for the works to go ahead without the requisite consultation period.

32. In response to questions from the Tribunal, Mr. Earwaker confirmed the following:

- The letter to the Lessees mentioned above did not include a copy of the quotation from South East Building Company Limited as, notwithstanding the date, it was not received until after the letter had been sent

- The second estimate from T. Clark dated 25th September 2013 has not been sent to the Lessees.

- His style of management is reactive rather than proactive. He makes arrangements for the outside of the building to be re-painted every five years but otherwise responds to problems as they arise. In view of the fact that the defective area is not visible without scaffolding, it would not in any event have been possible to anticipate that work was necessary even if regular inspections of the building were carried out.

- He has not commenced the Sec. 20 procedure

- South East Building Company has no connection with the Managing Agent or the Freeholder.

- When asked whether he intended to charge to the service charge account the cost of the Applications and his time in attending the Hearing today, Mr. Earwaker stated that he did not intend to make a separate charge for his time but that the cost of the Application and the Hearing would be charged.

- He went on to say that he was trying to get the work done as soon as possible for the benefit of the tenants and, if the Tribunal made a decision that prevented him from recovering the Application costs, this would be unfair as he would be out of pocket when he is only "trying to do the right thing"

- Mr. Earwaker accepted that he should have commenced the Sec. 20 procedure and that assuming that dispensation would be granted could result in further delay.

THE DECISION

33. The Tribunal was disappointed at the manner in which the application had been presented and the fact that the Sec. 20 procedure had not been commenced.

34. The Lessees have not been provided with copies of both estimates and they have not had the opportunity of nominating their own contractor.

35. However, they were aware that work needed to be done and had not attended the inspection or the Hearing. If they had wanted to object to the works or wished to raise questions about the contractor or the cost, they had the opportunity to do so. Accordingly, the Tribunal considers that there is no undue prejudice to the Lessees.

36. It is clear that these are qualifying works which need to be done urgently.

37. Taking all the circumstance into account and for the reasons stated above, the Tribunal is satisfied that it is reasonable in all the circumstances for it to grant dispensation from the requirements of Section 20(1) of the Act in respect of the works contained in the quotation dated 17th September 2013 provided by South East Building Contractors Ltd., subject to the following condition:

    Before the work commences, Mr. Earwaker is to write to all the Lessees outlining the current situation, enclosing copies of both quotations and informing them of their rights under Sec. 19 of the Landlord and Tenant Act 1985

Dated: Tuesday, 29 October 2013

Roger A. Wilkey FRICS (Valuer/Chairman)

Appeals

38. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

39. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

40. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend the time limit, or not to allow the application for permission to appeal to proceed.

41. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

42. If the First-tier Tribunal refuses permission to appeal, in accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007, and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the Applicant/Respondent may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.