9772

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UN/LDC/2013/0060**
Property	:	**7 Athelstan Road, Margate, Kent CT9 2BD**
Applicant	:	**Southern Land Securities**
Representative	:	**Mr P Lloyd of Hamilton King Management Ltd- Managing Agents for Landlord**
Respondents	:	**Miss J McDonnell (Flat 1)** **Mr C Carswell (Flat 2)** **Mr D Toohey (Flat 3)** **Mr J Nojovitz (Flat 4)**
Representative	:	**Mr S McDonnell – representing Miss J McDonnell**
Type of Application	:	**Section 20ZA Landlord and Tenant Act 1985** **Application to dispense with consultation procedure** **Covering proposed additional damp works**
Tribunal Members	:	**Mr R T Athow FRICS MIRPM - Valuer Chair** **Mr C C Harbridge FRICS – Surveyor**
Date and venue of Hearing	:	**29th November 2013** **Boardroom, Canterbury Christchurch University, Northwood Road, Broadstairs**
Date of Decision	:	**29th November 2013**

DECISION

Background

1. This application relates to additional repair works found to be needed once major works were commenced on a project where Section 20 consultation had already been carried out.

2. The Tribunal gave directions on 20th November 2013, following an application dated 13th November 2013 being made. In the Directions it was decided that the Fast Track process was appropriate due to the urgency of the matter and a Hearing was set down for 29th November 2013. Time limits for documents were set and any Respondents were requested to attend the Hearing to make any representations they felt were relative to the application and produce any documents they wished the Tribunal to consider.

Inspection

3. The property is a mid-terrace four storey house built about 100 – 125 years ago in a style typical of that time, with the main entrance floor set somewhat above road level, with ancillary and servants rooms on the lower ground floor. Sometime later the property was converted into four self-contained flats. These have been sold on long leases in more recent times.

4. The inspection was restricted to the interior of the lower Ground Floor Flat.

5. The Tribunal were shown the extent of the works under the original consulted project and the subsequent additional works that had become known once work commenced. The extent of these were as submitted in the Applicants bundle.

The Hearing

6. The Hearing took place at the Canterbury Christchurch University Campus at 11.00 am. Mr P Lloyd of Hamilton King Management Ltd represented the Applicant in person. Mr McDonnell represented Miss J McDonnell of Flat 1.

The Case for the Applicant

7. Rising damp had been found in the lower ground floor flat (Flat 1) and an inspection was made on 12th April 2013 by South Eastern Damp Proofing Ltd (SEDP) and a subsequent report issued under the reference S381.AP13.D. The inspection found there to be high moisture content to the left flank wall, the rear wall to the main house and the whole of the rear projection. High readings were also found in one area in the centre of the flat where the hall adjoins the bathroom. The recommendation was for the defective plastering to be hacked off to a height of up to 1 metre above floor level. Re-plastering was specified to be standard 3:1 salt free washed sharp sand/waterproof cement mix in

2 coats. A quote of £3,235.00 plus VAT (£3,882.00 gross) was given with the report.

8. On 2nd April 2013 the landlord's agent issued the Notice of Intention in accordance with the S20 consultation process required by legislation. There were no observations or nominations for contractors from the lessees.

9. A second quote was obtained from DWC. This included a report and specification of works. It was more comprehensive than the report from SEDP, and included:

   a. Hack off the plasterwork to the living room left flank wall as far back as the rear bedroom doorway for a height of 1.5 metres.
   b. Hack off the plasterwork to all walls of the rear bedroom and the rear wall of the middle room to ceiling height.
   c. Hack off one area in the centre of the flat where the hall adjoins the bathroom to a height of 1.2 metres.
   d. The cost of these works was £3,747.60 plus VAT (gross £4,497.12).
   e. An insurance policy covering this work for a period of 20 years was offered at the sum of £100.70 including IPT.

10. Additional work of reinstating 2 radiators was required and 2 quotes were obtained, one from Avalon 3 Ltd in the sum of £325.00 plus VAT (gross £390.00) and one from PMC in the sum of £350.00 plus VAT (gross £420.00).

11. These tenders and quotes were forwarded to lessees in accordance with the consultation legal requirements on 21st June 2013 and no objections were made by any of the lessees at any point during the observation period.

12. The contract was awarded to South East Damp Proofing and work commenced on 11th November 2013

13. Upon stripping the dry-lining from the flank party wall it was found that the rising damp had risen higher than expected. An additional quote was obtained from SEDP to hack off the plasterboard to ceiling height along the flank party wall and to hack off the plaster to the remaining three walls of the rear projection, and the plaster to the rear wall middle room, again to ceiling height. The additional quote allowed for the lining of all the walls in the rear bedroom with thermal insulated plasterboard with a skim plaster finish, and also to re-plaster the remaining disrupted walls. The cost of these additional works was estimated to be £2,350.00 + VAT (£2,820.00 gross).

14. The Managing agent wrote to all lessees on 13th November 2013 informing them of the problem, the additional cost and that the works would continue, with the Landlord making an application to the First

Tier Property Tribunal for dispensation of the Consultation process for these additional costs.

15. When questioned by the Tribunal Mr Lloyd of Hamilton King said that although he did not have first-hand knowledge of the facts, he was certain that there had not been a specification of the works, nor had there been a suitably qualified or experienced survey overseeing the tender phase or the works themselves.

The Case for the Respondents

16. The Tribunal did not receive any written representations from the Respondents, nor were there any made at the Hearing.

17. R McDonnell stated that he was happy with the way the work was carried out and that the lessee of the affected flat was inconvenienced as little as possible by the action of the managing agents. He had been in regular communication with Ms Chatzimanoli at their office who had been helpful. Had the agents taken the course of full consultation in accordance with legislation the lessee would have been dispossessed of her flat for a period of at least two months and the work delayed further because the contractor would have pulled off site and then had to re-schedule the remaining work at a later date.

The Law

18. The statutory provisions primarily relevant to these applications are to be found in S.20ZA of the Landlord & Tenant Act 1985 as amended (the Act).

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

    a. '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.'

20. In Section 20ZA (4) the consultation requirements are defined as being:

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

21. In Section 20(2) of the Act 'qualifying works' in relation to a service charge, means 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.

22. 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. The relevant requirements applicable to this application are those set out in Part 2 of Schedule 4 of the Regulations.

23. The Tribunal may make a determination to dispense with some or all of the consultation requirements but it must be satisfied it is reasonable to do so. The Tribunal has a complete discretion whether or not to grant the application for dispensation and makes its determination having heard all the evidence and written and oral representations from all parties and in accordance with any legal precedent.

24. The matter has been considered in the leading case of **Daejan Investments Ltd v Benson & Ors [2011] EWCA Civ 38, 2011** in which three main issues were identified namely (i) whether the financial consequences to the landlord were relevant to a grant of dispensation under S20ZA; (ii) whether the nature of the landlord was relevant; and (iii) the correct approach to prejudice allegedly suffered by a tenant as a consequence of a landlord's failure to comply with the Consultation Regulations.

25. In the above case it was held that the financial effect of refusing dispensation on the landlord is an irrelevant consideration when exercising discretion under S20ZA (1) [59 of the Judgment]. Although there is no "closed list" of situations in which dispensation might be granted, the following situations might commend a grant of dispensation: (i) the need to undertake emergency works; (ii) the availability of only a single specialist contractor; and, (iii) a minor breach of the procedure under the Consultation Regulations which causes no prejudice to the tenants [63].

26. In the above case it was noted that the nature of the landlord can be a relevant factor, e.g. where the landlord is a company owned or controlled by the leaseholders [67].

27. It was further noted that in considering whether to grant dispensation, the LVT should consider whether the breach of the consultation regulations has caused significant prejudice to the leaseholders [72]. The landlord's failure to comply with the regulations, as ruled by the LVT, caused the respondents serious prejudice. The curtailment of the consultation exercise was a serious failing [73].

The Consideration

28. The Tribunal considered all of the evidence submitted and the comments made by the Managing agent and Mr McDonnell.

29. There had been no observations or objections from any of the lessees at any stage of the consultation process.

30. Once the contract was under way it would not be economically prudent or practically efficient, nor personally convenient for the lessee to suspend the works to give time for the consultation process.

31. The possibility of closing the contract with the original contractor and changing to DWC part way through a contract is highly unlikely without some form of penalty being imposed by the initial contractor. The overall cost would be incapable of calculation.

32. Concern was raised by the Tribunal that there had been no supervision of the specifying of the works and that the tenders were not compared for similarity. Furthermore there had been no supervision of the works.

33. Had the managing agent done all of these, the variance in the specification would have been seen before the tenders were issued for consultation. Checks could have been made and queries on the inconsistencies raised and amendments made to enable them to be compared like-for-like.

The Findings and Reasons

34. In the present case the Tribunal is satisfied that no emergency situation exists as identified in **Daejan Investments Ltd v Benson & Ors [2011] EWCA Civ 38, 2011,** but rather this was an example of works being "added to" upon advice by the builders. However S20ZA cannot be used as a mechanism for a rolling programme of works in the absence of a proper S20 procedure. Such a proper procedure would involve a proper survey, the obtaining of at least two proper quotes and notice being served in the required format and at the right time. To allow S20ZA to retrospectively circumvent such a proper procedure has the potential to cause significant prejudice to the Respondents.

35. The Tribunal was satisfied that once the work was under way, the correct action was taken to mitigate the inconvenience to the lessees and that there was no prejudice to them.

36. The Tribunal however was concerned that because there had not been any checking of the tenders by anyone within the managing agents nobody spotted that the quote from DWC included all of the work eventually undertaken by SEDP. Although the DWC was, on the surface dearer, in the end it was cheaper than the actual cost of the full works.

37. At the date of the Hearing not all of the bills had been issued (or at least made known at the Hearing) and so the final sum involved was not known. The result is that the lessees will find these when the financial year end accounts are published.

38. The Tribunal orally informed the parties that the application to dispense with the consultation requirements in relation to these additional qualifying works was granted in full as sought by the Applicant.

39. The purpose of this decision is to formally record that the application was granted and the basis for doing so.

40. In should be noted, the Tribunal does not find that any costs incurred in relation to the works carried out are reasonable. If and when those costs are known, they can be challenged by the Respondents if they are considered to be unreasonable.

41. It is important to distinguish between the reasonableness of dispensing with the notice requirements and the reasonableness of the works themselves.

42. The decision of the LVT cannot give or imply any judgement about the reasonableness of the works themselves.

Signed

Richard Athow FRICS MIPRM Valuer Chair

Dated

3rd December 2013

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber), which may be on a point of law only, 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.

2. 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.

3. 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 time or not to allow the application for permission to appeal to proceed.

4. 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.