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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of applications under section 20ZA of the Landlord and Tenant Act 1985 (dispensation with consultation requirements)

Case No.	CHI/29UQ/LDC/2013/0014
Property:	**17 Park Road,** **Tunbridge Wells** **Kent TN4 9JN**
Between:	**Mr Simon Clifford** **(the Applicant/landlord)** and **1. Mr and Mrs Toalaster** **2. Mr and Mrs Simon Clifford** **3. Mr Tom Davis** **4. Mr Christopher Ims** **(the Respondents/lessees)**
Date of hearing:	28 February 2013
Date of the decision:	4 March 2013
Members of the Tribunal:	Mr M. Loveday BA(Hons) MCIArb Mr RA Wilkey FRICS

INTRODUCTION

1. This is an application under s.20ZA of the Landlord and Tenant Act 1985 to dispense with consultation requirements in respect of major works. The works relate to the remedying of dry rot at a property in Tunbridge. The application was made by the landlord Mr Simon Clifford on 11 February 2013 before any of the works commenced. Directions were given on 18 February 2013 which directed an urgent hearing under regulation 14 of the LVT (Procedure) (England) Regulations 2003. The matter was listed for hearing on 28 February 2013.

2. At the conclusion of the hearing the Tribunal gave an oral decision in accordance with regulation 18(2) of the Leasehold Valuation Tribunal (Procedure)(England) Regulations 2003. The Tribunal refused the application for the reasons set out below.

3. The freehold is presently vested in Mr Clifford. Mr Clifford is also the joint lessee of the ground floor front flat and the ground floor rear flat (with his mother). The other lessees are Mr and Mrs Toalaster (basement flat), Mr Tom Davis (Flat B first floor flat) and Mr Chris Ims (Top floor flat). The lessees are all respondents to the application.

4. At the hearing, the applicant was represented by Mr Dion Bailey of South East Block Management Ltd, the managing agents for the property. The third and fourth respondents attended in person.

5. The Tribunal inspected the property immediately prior to the Hearing. The property comprises a semi-detached, Victorian House which has been converted into five self-contained flats. The main roof is pitched and covered with tiles. There is a front dormer and a single storey rear addition. The main walls are of solid construction with brick elevations. It was apparent from the limited inspection of the exterior of the building as a whole that significant repair and redecoration were required. The Tribunal

was shown the inside of the ground floor rear flat (No. 17D) where the outbreak of dry rot had first been noticed. The living room is approached direct from the outside and the floor coverings together with many of the floor boards have been removed. The exposed floor timbers shown signs of significant attack by dry rot fungus. The Tribunal's attention was drawn to the lack of ventilation to floor timbers in the above room and the fact that the drive at the side of the property had been laid over any damp proof course in the flank wall. These appeared to be significant contributory factors to the outbreak of dry rot.

6. Each flat is let on a long lease. The Tribunal was provided with a copy of the lease for the basement flat 17b, and it was informed that the remaining leases were in substantially the same form. By clause 4(2) of the lease, the lessee was obliged to pay a maintenance contribution or service charge in respect of the costs expenses and matters set out in the Fourth Schedule to the lease. The Fourth Schedule included "the expenses of maintaining repairing redecorating and renewing (a) the main structure of and in particular the external walls foundations roof chimney stacks gutters and rainwater pipes of the Building". The "Building" was defined in recital (1) to the lease as "the property known as 17 Park Road Tunbridge Wells". It should also be noted that the lease of the basement flat expressly included "the joists beneath the floor" in the parts demised to the lessee: see clause 1.

THE APPLICANT'S CASE

7. Mr Bailey explained that problems first emerged on 27 September 2012 while a tenant of the ground floor rear flat was moving in some new furniture. Part of the floor to the living room to the flat collapsed into the void below. Mr Bailey immediately contacted the freeholder and the other lessees by email to explain what had happened. The emails to the lessees explained the course of action that the agent proposed to take, stating that

the agent would get estimates for repairs and then (as a matter of urgency) apply to the LVT to dispense with the consultation requirements. The emails explained that the cost would be a "shared expense" or a "freehold related expense". No copy of these initial emails was produced. Mr Bailey stated that there were immediate replies from the lessees. Mr Ims responded that he was not responsible for contributing to the cost of the works, and that he would be seeking legal advice. On behalf of Mr and Mrs Toalaster, Mrs Sears (their daughter) initially disputed that her parents were responsible for any "shared" costs, although they had since stated that they were no longer opposed.

8. The agent had then commissioned a survey from Dr Duncan Philips of Foxtrot Surveys. A copy of the report dated 8 October 2012 was produced ti the Tribunal. The gist of the report was that there had been dry rot in the flat in excess of 5 to 10 years. This could have been avoided with prior attention to the effective damp proofing of the wall and floor in this vicinity. Unless the conditions were changed, there was a risk that other parts of the building "may also be damaged". The report included the following passage:

> "A further risk of the dry rot fungus is that it can remain dormant for many years. Accurate identification of the fungus, its source and origin and correct treatment to prevent further outbreaks are thus critical. Failure to remedy the source of origin and/or effective treatment can lead to further outbreaks in future years."

9. Mr Bailey also relied on estimates from two main contractors, One was an estimate from Gulliver Timber Treatments Ltd dated 7 November 2012 amounting to £10,068 (including VAT). The agent had also obtained an estimate from Kenwood Damp Treatments, but no copy was provided to the Tribunal. The agent had initially rejected this because it covered only half the required work. However, Kenwood later provided a revised estimate for the same work covered by the Gulliver estimate with a slightly higher price. The

landlord therefore wanted to proceed with Gulliver Timber Treatment as contractors. These estimates had been provided to the lessees by email. Mr Ims and Ms Sears indicated that they had knowledge of Gullivers.

10. Mr Bailey also secured a single estimate for other minor items of work, although only one was provided to the Tribunal. This was an estimate from Jay's Carpets for new carpets at £440. The tenant of the flat had had to move out because of the collapse of the floor, and he in fact now lived in Mr Ims's flat.

11. When asked about the cause of delays between September 2012 and the issue of the application to the Tribunal, Mr Bailey stated that there had been a number of delays caused by the "time of year" and the need for some contractors to revisit their estimates. A problem caused by damp had also emerged in the basement flat at the front of the building, and the agent had to spend time considering whether remedial works to both flats should be carried out together. On 20 February 2013, the applicant served a Notice of Intention under paragraph 1 of Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 in respect of the works to the front basement flat.

12. Mr Bailey accepted that in retrospect, there would have been enough time to carry out a full s.20 consultation. However, the agent initially thought that there would not be enough time to follow the section 20 notice procedure. Bearing in mind that costs were already being disputed by two lessees, he considered that the LVT would be the best way "to eliminate the costs issues in hand more promptly". He contended that the emails mirrored the consultation requirements and that dispensing with the consultation requirements would not therefore cause any substantial prejudice to the lessees. He sought a dispensation only from paragraphs 8-12 of Schedule 4 of the regulations, and he would be happy to issue a contract notice under paragraph 13 if one was required. If dispensation was not granted, the joint

lessees of the flat would be prejudiced. The flat could not be re-let and there was therefore a loss of rent. It would take at least another 90 days to make the flat habitable while the consultation was taking place. A further delay would also risk the spread of the dry rot. He accepted that there was nothing in Foxtrot's report to this effect, although the expert had explained this orally. Mr Bailey also relied on the passage from the report quoted above.

13. Mr Bailey summarised the anticipated costs of dealing with the dry rot as follows:

a.	Gulliver's dry rot treatment:	£10,068
b.	Insurance backed guarantee:	£70
c.	Foxtrot report:	£114
d.	Carpets:	£495
e.	Plumbing:	£320
f.	Decoration:	£120
g.	Removal of tenants' furniture:	£65
h.	SEBML Ltd supervision fee:	£562.10
i.	LVT fees:	£300
j.	Rent to Mr Ims for housing tenant:	£1497.90
k.	Loss of rent:	£2875

This would suggest contributions of £2601.71 by the lessees of the basement and two ground floor flats, and £4333.45 by the lessees of the middle and top floor flats.

14. In response to the suggestion (below) that Mr Ims should be able to tender for the works, he did not know whether Mr Ims had the experience to do this kind of work. If there were cost savings, then obviously the agent would consider whether savings could be made. Personally, Mr Bailey did not consider it was appropriate that lessees should do the work to their own block because there

was a potential for conflict of interest. However, if it saved money then the applicant would consider it.

THE FOURTH RESPONDENT'S CASE

15. Mr Ims is a building contractor. He stated that there had been a huge amount of time when things had not been done, both before and after the collapse of the floor. The joists should have been sprayed with fungicidal treatment, but the dry rot was very still slow growing. He stated that "it went quiet for a long time". In addition, there was now second project to the front basement flat, which would be far in excess of the costs.

16. He submitted that the applicant should still be required to go through the full consultation requirements. The emails had not really amounted to a consultation. Although the lessees had been provided with two estimates for the works, they had not been given an opportunity to recommend a contractor. Mr Ims stated that as a contractor himself, he knew the work could be done more cheaply – indeed he would be happy to move the project forward quickly by doing the works himself and using Gullivers as a sub-contractor. However, he had not been given a chance to put in an estimate or suggest someone else.

17. The main objection from the lessees had however always been that it was their impression that the freeholder or lessee of the flat was responsible for repairs to the joists under the flat.

THE THIRD RESPONDENT'S CASE

18. Mr Davis stated that he was not against the application in principle. However, the landlord should have been able to get on with the work by now, and not simply delayed things until now.

DECISION

19. The Tribunal is satisfied that at least part of the works referred to by Mr Bailey fall within the definition of "qualifying works" in section 20(2) of the Act. Although it is highly unlikely that all the matters listed by Mr Bailey above (such as loss of rent or LVT fees) are "works ... on a building or other premises", the items set out the Gulliver's estimate dated 7 November 2012 undoubtedly do so. Moreover, although the potential contribution of each lessee to those works is not specified in the leases, it is clear that the service charge liability of each lessee towards the cost of those works will exceed £250 per flat. It follows that if the applicant is to recover more than £250 per flat for the cost of those works, he must either comply with the consultation requirements or obtain dispensation under s.20ZA.

20. The Tribunal explained to the parties that the questions of (i) whether the costs eventually incurred by the landlord in dealing with the dry rot are recoverable from the lessees as service charges under the leases and (ii) whether those costs are reasonably incurred are not considered by the LVT under a s.20ZA application. Those issues may well be the subject of a future application to determine liability for service charges under s.27A of the Act. At this stage, the Tribunal simply has to consider whether, under s.20ZA, it is "*satisfied that it is reasonable to dispense with the [consultation] requirements*". The relevant requirements appear in paragraphs 8-12 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003.

21. The Tribunal considers it is not reasonable to dispense with the consultation requirements in Schedule 4 for the following reasons:

    (a) There is no evidence that there is an immediate need to progress works to prevent further damage to the building. Although ordinarily the treatment of extensive dry rot that has already caused structural failure might be considered urgent, there is no evidence of any urgency for works in this case. There is nothing to suggest that the rot has progressed since first discovered in September 2012 or that there is any immediate further risk of damage to the building. Mr Bailey referred to informal advice given by Dr

Philips, but the evidence in the Foxtrot report is that the rot has been present for between 5 and 10 years. The report states only that there is a risk "further outbreaks in future years."

(b) The immediate need of the tenant for re-housing has been met. The only damage from further delays with the work is therefore a pecuniary one, namely the loss of rent to the lessee. Loss of rent is a consideration taken into account by the Tribunal, but it is outweighed by the weight of the other factors.

(c) There has been an unreasonable delay in applying to the Tribunal. A full four months passed between the collapse of the floor and the application to the Tribunal. The explanations given by the applicant for this delay are no answer to this. Again, the delay does not suggest there is any urgency. The application was therefore not made promptly.

(d) Mr Bailey candidly admitted that there had in fact (as it turned out) been time to carry out consultation in accordance with the regulations. However, the applicant appears not to have started the process – and there is no explanation as to why he had not done so.

(e) This situation can be contrasted with what has happened in the case of the damp to the other flat in the building, where a proper initial notice was served.

(f) The emails relied on by Mr Bailey were not produced to the Tribunal, but it is clear on the evidence that they were a poor substitute for proper compliance with the regulations. In particular, the Tribunal accepts the evidence of Mr Ims that the lessees were not given an opportunity to nominate a potential contractor as required by paragraph 8(3) of Schedule 4. Had the lessees been given such an opportunity, the Tribunal is satisfied that Mr Ims would have been alive to the opportunity since it was clear he was interested in undertaking the work himself. Failure to afford an

opportunity to nominate a person under paragraph 8(3) would cause serious prejudice to the lessees.

(g) There may well be other advantages in a delay. The landlord may wish to consider using Mr Ims as contractor (there is no obligation to do so) and/or combining the contract to deal with the dry rot with the works to the basement flat.

(h) Apart from the Gullivers' estimate and the carpet estimate, there is no evidence about any of the remaining items of work and other expenditure referred to by Mr Bailey. Items such as decoration and plumbing may well fall within the definition of "major works" in s.20 of the Act and which these would ordinarily require consultation. If such costs are to form part of the major works for which the applicant seeks a contribution from the lessees, a consultation needs to be carried out about those costs as well. The lessees have suffered prejudice in not being consulted about those extra costs.

(i) The offer by Mr Bailey to comply with paragraph 13 of Schedule 4 does not meet the above prejudice. There may be no need for a contract notice and in any event the consultation is effectively over by the time a contract is let.

22. This decision is limited to the question of dispensation with the consultation requirements and is not a determination that the cost of the works is reasonable (under s.19 of the 1985 Act) or that any sum which may be demanded by the landlord is payable (under s.27A of the 1985 Act). It is open to any party to seek a determination on those matters at a later stage.

CONCLUSION

23. The Tribunal therefore determines that the consultation requirements should not be dispensed with under s.20ZA of the Landlord and Tenant Act 1985 in relation to the qualifying works, namely the works referred to in the invoice from Gulliver Timber Treatment dated 7 November 2012.

MA Loveday BA(Hons) MCIArb
Chairman

4 March 2013