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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CW/LDC/2013/0015**
Properties	:	**Weller Court, Walnut Drive, Finchfield, Wolverhampton, WV3 9EF**
Applicant	:	**Holding & Management (Solitaire) Ltd**
Applicants' Representative	:	**CP Bigwood** **Miss E Fingleton**
Respondents	:	**The leaseholders of Weller Court, Walnut Drive, Finchfield, Wolverhampton, West Midlands, WV3 9EF**
Respondents' Representative	:	**(1) Mr R Gamble (on behalf of the Residents Association)** **(2) Mrs S Prestridge (Flat 8)** **(3) Mr F Keeton (Flat 10)** **(4) Mrs B Kapoor (Flat 17)** **(5) Mr & Mrs P Schofield (Flat 18)** **(6) Mr V Patel (Flat 20)**
Type of Application	:	**An Application under Section 20ZA of the Landlord & Tenant Act 1985 for dispensation of consultation requirements in respect of qualifying works.**
Date & Place of Hearing	:	**An inspection was carried out on 16th April 2014 followed by a case management hearing at Priory Court Birmingham. The full Hearing was held on 1st August 2014**

Tribunal Members	:	**Mr G S Freckelton FRICS (Chairman)** **Mr P J Hawksworth LLB**
Date of Decision	:	20 AUG 2014

DECISION

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1. INTRODUCTION

1.1 By an application dated 6th December 2013 received by the Tribunal on 9th December 2013, the Applicant through its managing agents, C P Bigwood, applied to the First-tier Tribunal for dispensation from the consultation requirements imposed by Section 20 of the Landlord & Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003 in respect of the property known as Weller Court, Walnut Drive, Finchfield, Wolverhampton, WV3 9EF.

2. THE BACKGROUND

2.1 According to the Application form submitted by the Applicant, Weller Court comprises of a listed building with more modern additions.

2.2 Castle Estates (the previous Managing Agents) were advised in November 2011 of water ingress into 15 Weller Court. Investigations subsequently took place to identify the cause and in July 2012, work commenced on the exterior face of the listed building, which included the removal of timber frames and masonry panels. The timber support was replaced with a hardwood beam and all associated redecoration was completed.

2.3 The Application states that there was extensive discussion with the owners of the affected apartment, Number 15 Weller Court and that there was an active Residents Association in place. The Applicant therefore presumed that the issue was discussed between all parties on site and the official minutes from the relevant Resident Association meetings in 2012 confirms that they were aware of the major issues at Number 15 Weller Court.

2.4 Dispensation was now sought as it had come to light that the works completed were in excess of the limit imposed under Section 20 of the Landlord & Tenant Act 1985. The personal circumstances of the owners of 15 Weller Court at the time the work was required meant that the work was considered urgent and the property had to be made habitable. At that time, the owners were concerned about the contractors who would be instructed and the type of paint used as they were concerned about fumes. In order to allay concerns, the owners of 15 Weller Court were invited to select both the contractor and type of paint used.

2.5 Castle Estates instructed contractors to investigate the issues in May 2012 but this was hampered by extreme weather conditions. Comparison quotations were obtained and work commenced in June 2012. However, the work exceeded the initially expected limits and further quotations were obtained in order to complete the work, which was commissioned in July 2012.

2.6 The landlords now seek dispensation from the consultation requirements provided for by Section 20 of the Landlord & Tenant Act 1985.

3. THE LAW

3.1 Where a landlord proposes to carry out qualifying works, which will result in a charge being levied upon a leaseholder of more than £250, the landlord is required to comply with the provisions of Section 20 of the Landlord & Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003.

3.2 Failure to comply with the Regulations will result in the landlords being restricted to recovery of £250 from each of the leaseholders unless he obtains a dispensation from a Leasehold Valuation Tribunal under Section 20ZA of the Act.

3.3. In deciding whether or not to grant dispensation, the Tribunal is entitled to take into account all the circumstances in deciding whether or not it would be reasonable to grant dispensation. An application for dispensation may be made before or after the commencement of the works.

4. THE INSPECTION

4.1 The Tribunal carried out an inspection of the property on Wednesday 16th April 2014.

4.2 They found the property to comprise of a development of 21 self-contained properties with communal parking and garden areas. The gardens were noted to be well-maintained.

4.3 The original part of Weller Court was a listed building with further recently constructed buildings on the site. The Tribunal understands that the property was converted and new buildings erected in around 2005.

4.4 The Tribunal also carried out an internal inspection of 15 Weller Court to enable them to inspect the area where repairs had been undertaken following water ingress. Photographs had been submitted by Mr B Prestidge of 15 Weller Court and the Tribunal were shown the areas to the kitchen, lounge, main bedroom and nursery bedroom where it was submitted water was still leaking into the property.

5. THE HEARING

5.1 A Hearing was held on 16th April 2014 at which it became apparent that not all the parties had been sent copies of the various submissions.

5.2 The Hearing continued on the basis of a Case Management Hearing following which Further Directions were issued by the Tribunal.

5.3 A full Hearing was held on 1st August 2014 at the Tribunal's offices in Birmingham following receipt of submissions from the parties.

5.4 Immediately prior to the Hearing, the Tribunal office received a telephone call from Mrs S Prestidge. This was confirmed by email timed at 10.33am after the commencement time for the Hearing. The email confirmed that Mrs Prestidge would not be attending the Hearing as she believed the bundles provided to her were incomplete. In particular, she referred to photographs and video evidence previously submitted by Mr B Prestidge which was not included. Mrs Prestidge also confirmed that the Applicants' letter to the Respondent suggested that three bundles had been served and she had only received two. On this basis, Mrs Prestidge did not believe that the Directions issued by the Tribunal had been complied with by the Applicants.

5.5 The Tribunal considered the email from Mrs Prestidge which did not request an adjournment of the Hearing. The Hearing bundle provided by the Applicants was sent to the parties in accordance with the Tribunal's Directions. It extended to 279 pages and had Mrs Prestidge believed that the bundle was incomplete, she had had ample time and opportunity to telephone the Tribunal to confirm whether or not the correct papers had been issued. Mrs Prestidge had made no attempt to confirm whether or not she had received the full bundle. On behalf of the Applicant, Miss E Fingleton, solicitor on behalf of Holding & Management (Solitaire) Limited, confirmed that she had herself prepared the bundles for submission to all the parties and believed that a complete set of papers had been sent to all interested parties. Miss Fingleton confirmed that the second paragraph of her letter dated 17th July 2014 enclosing the bundle of papers was sent to all the parties. This was a copy of the letter sent to the Tribunal, which confirmed enclosure of the first set of three bundles of documents, a further two of which were to follow. The Tribunal had directed that three bundles be provided to them in advance of the Hearing.

5.6 The Tribunal therefore determined that as Mrs Prestridge had made no attempt to ascertain whether or not her bundle was complete and had only telephoned the Tribunal office shortly before the Hearing was due to commence, that it would be unfair on the other parties present to consider an adjournment. The Tribunal determined to proceed with the Hearing.

6. AGREED MATTERS

6.1 At the commencement of the Hearing, Miss Fingleton confirmed that she would be speaking on behalf of the Applicant and Mr R Bailey, Chairman of the Residents Association, confirmed that he would be speaking on behalf of the Respondent. The Tribunal had received written submissions from Mr R Bailey on behalf of the Residents Association, Mrs S Prestidge, Mr B Prestidge, Mr and Mrs Barnes and Mr Schofield. None of the Respondents who had submitted written submissions (with the exception of Mr R Bailey on behalf of the Residents Association) attended the Hearing.

6.2 It was agreed by the parties at the commencement of the Hearing that the timeline of events from when the leaks to apartment 15 were first reported by Mr and Mrs Prestidge to the time the work was subsequently undertaken had been extensively documented in the written submissions by both the Applicants and the Respondents. The parties agreed as to the works that were carried out whether or not they considered them to have resolved the issues.

6.3 It was also agreed by the parties at the commencement of the Hearing that there were still issues with water ingress into 15 Weller Court. The report dated May 2013 by Sarah Baldwin of Christopher Thomas Architects (page 237 of the bundle) detailed the issues outstanding and these were set out clearly in the specification and schedule of works proposed dated April 2014 (page 253 of the bundle). The parties confirmed that they were not proposing submissions to the contrary and accepted that further works are required.

7. THE APPLICANTS CASE

7.1 The Applicant submitted that Weller Court comprised of 21 properties being partly an original listed building with new build properties within the site. Apartment 15 is a corner property and as such, exposed to the weather. The large windows and the position of the property have contributed to the ingress of water.

7.2 The Applicant confirmed that in the written submissions, it had referred in detail to the case of Daejan Investments Ltd –v- Benson (2013) UKSC14, (2013) HLR21 and did not believe that the leaseholders had been prejudiced by the work undertaken. The Applicant submitted that it was initially thought that the works undertaken would be sufficient and would be below the consultation threshold but when initial works commenced, rotten timbers were found and more serious issues had to be dealt with. As such, the costs in July 2012 totalled approximately £9,600, which equated to £457.14 per leaseholder.

7.3 The Applicant submitted that Weller Court was an old building and the managing agents did not know, and could not have known when they started the works, that further works would be required. They had completed the works at Phase 1 (the cost of which was below the £250 limit which would trigger a consultation under Section 20 of the Act) and then proceeded with Phase 2, which resulted in the total cost of approximately £9,600. The Applicant submitted that further works were currently being considered to resolve the problems of water ingress and that it was to be expected that older buildings would be more expensive to maintain than newer buildings.

7.4 The Applicant submitted that both Castle Estates (the previous managers) and CP Bigwood (the present managers) had done their best but were not able to comply with the consultation requirements of the 1985 Act.

7.5 The Applicant further submitted that in their written submissions, the leaseholders had not shown that if consultation had been undertaken, they would have appointed someone else to carry out the work at a cheaper cost. The Applicant confirmed that the managing agent had thought that the works completed in Phase 1 would resolve the problems but when they did not, there was no option but to proceed with the Phase 2 works. The Applicant agreed that there were still ongoing issues but that the leaseholders had not proved that they could have done anything differently and as such had not been prejudiced by the works undertaken.

7.6 The Tribunal referred the Applicant to page 233 of the bundle, which comprised a letter from Mrs Prestidge to Hilary Quinn of Solitaire.

7.7 The letter clearly set out the general complaint, not only of Mrs Prestidge, but also the remaining Respondents and stated that the leaseholders had been prejudiced as a result of a Section 20 Consultation not being invoked. In particular: -

(i) Leaseholders had not been allowed to inspect a specialist report that identified the root cause of the problem.
(ii) Leaseholders had not been given the opportunity to recommend a contractor.
(iii) Leaseholders had not been provided with a specification of works and guaranteed period of the same.
(iv) Leaseholders were not afforded the right to make observations that they would have undoubtedly have made given that works to remedy the water ingress had already been conducted and charged to the service charge account.

7.8 The Tribunal also referred the Applicant to the statement submitted by Mr Bailey on behalf of the Residents Association at pages 247 and 248 of the bundle in which Mr Bailey had reiterated similar points and was of the opinion that the failure to consult had prejudiced the leaseholders.

7.9 The Applicant submitted that due to their personal circumstances, Mr and Mrs Prestidge were pushing strongly for the works to be completed and were closely involved even down to choosing the colour of paint and the nomination of the contractor to carry out the works. The Applicant further submitted that in its opinion, Mr and Mrs Prestidge were so involved that it was incorrect for them to say that they had been prejudiced by a lack of consultation. Indeed, it was Mr and Mrs Prestidge who had added to the urgency of the situation as they were pushing for works to be undertaken.

8. THE RESPONDENTS CASE

8.1 Mr R Bailey, on behalf of the Respondents, confirmed that there had been issues regarding water ingress since 2010/2011 and that these had not been resolved. In 2012 it was evident that some work had been done but the Respondents were unsure exactly what that work had comprised of.

8.2 The Respondents submitted that no one had thought to consider whether DJH Decorators were the correct contractors to carry out extensive structural and building works to the property. It was clearly of concern to Mr and Mrs Prestidge because it was their property which was affected and they wished to protect their property, their family and their future. It was further submitted that Castle Estates led the works that were undertaken and although the Freeholders were aware, they did not intervene at any time and did not involve a surveyor, which they should have done to ascertain the exact extent of the problems.

8.3 The Respondents submitted that Solitaire had asked Castle Estates to provide a surveyor's report, to provide specifications for works, to obtain quotations and to undertake the consultation process but Castle Estates did not follow their instructions. However, Solitaire took no steps to ensure that the work was being undertaken and that their instructions were being adhered to.

8.4 The Respondents submitted that it was evident that Castle Estates had 'fobbed off' Solitaire. In particular, the Respondents referred to page 107 of the bundle and the emails between Castle Estates and Hilary Quinn of Solitaire. It was clear from these emails that Solitaire were asking for a surveyor's report and Castle Estates merely responded to the effect that they had spoken to two surveyors who both agreed that a survey would not reveal where the leak was coming from. The Respondents therefore submitted that Castle Estates were blinkered in carrying on with works being undertaken by DJH and did not want to appoint a surveyor or do anything further which the Respondents submitted was unprofessional. As Solitaire did not insist on the procedure they had asked for being followed, they had not dealt with matters correctly. It was quite clear they needed to consult with the residents and to arrange for the correct work to be undertaken. At no time had Solitaire or Castle Estates thought to ask if they were carrying out repairs in the correct manner.

8.5 The Respondents further submitted that had the Section 20 Consultation been undertaken, the Respondents would have had the opportunity of requesting that surveyors be appointed to diagnose the problem. Had this been undertaken, then the property would not be in the situation it was in today. The Respondents confirmed their opinion that the correct professional action would have been to do what was now being undertaken with an architect's report and detailed specification of works so that repairs could be properly completed. The Respondents confirmed that they did not know if the work carried out

by DJH could have been carried out cheaper but the problem was that they did the wrong work and did not resolve the issue.

8.6 Under questioning from the Tribunal, the Respondents confirmed that had the Section 20 Consultation been undertaken, the Respondents would have informed the Applicant:-

(i) That there was an ongoing problem,
(ii) That they required a proper structural survey undertaking, and
(iii) That they would need a specification of works required to fix the problem together with supervision of those works.

8.7 The Tribunal asked the Respondents how the lack of the opportunity to comment had prejudiced all the leaseholders and the Respondents confirmed that they were now facing considerable additional costs to rectify a problem that should have been resolved in 2012.

8.8 The Respondents confirmed their opinion that the cost of works was not £9,600 as stated by the Applicant but £10,230 as specified in the annual accounts. The Respondents did however concede under questioning by the Tribunal that additional works could have been undertaken elsewhere on the site, which were included in this figure.

8.9 The Respondents submitted that with at least £9,600 spent in 2012, the Residents were now facing potential further expenses which could be as much as £30,000 and that it was unfair for the residents to be faced with a total cost of some £40,000 as a result of work, which was not properly specified or completed in 2012.

8.10 The Respondents submitted that they was surprised the Applicant had not obtained a report from their architects to confirm whether any of the work that was proposed to be undertaken now was to repair earlier works or only comprised new works. As such, the Respondents submitted that they had been seriously prejudiced.

8.11 In response, the Applicant confirmed that the scope of the work that was now contemplated to resolve the problem included: -

(i) Removal, re-leading and re-fixing of leaded lights to prevent ongoing water ingress.
(ii) Removal, redecoration and re-fitting of existing metal framed opening lights.
(iii) Removal of paint to timber frame, opening up and investigation of same and replacement of defective timbers.
(iv) Redecoration of timber frame.

The Applicant confirmed that these were not the same works as had previously been undertaken.

8.12 The Applicant further submitted that the works completed in 2012 included replacement of rotten beams and replacement and repairs to panelling above the windows as well as repairs above the main entrance door. The works which were contemplated and are the subject of an ongoing Section 20 Consultation are to the windows and window frames only. The Applicant also confirmed that the tender process had been temporarily halted for ongoing works due to further matters brought up by Mr and Mrs Prestidge.

8.13 The Respondents confirmed their opinion that these matters should have been investigated and attended to in 2012.

8.14 The Applicant again confirmed that Mr and Mrs Prestidge had initially wanted the repair work carried out quickly and had approved the contractors to carry out the works. It was confirmed that the remaining leaseholders were not given an opportunity to comment and were not consulted but when works were first contemplated, the costs were below £250 per property and therefore below the figure at which the consultation process would have been triggered. At that time, the Applicant did not know that additional works would be required.

8.15 The Applicant did however confirm that on 31st May 2012, all the lessees were told of the work that was being carried out. The Applicant confirmed that it would not have provided a detailed specification to all the lessees or a guarantee in any event. The Applicant also submitted that repairs had not been charged twice as alleged by Mrs Prestidge as previous repairs were for the roof and not the windows and panels.

8.16 The Tribunal asked the Applicant to explain why it did not submit an urgent application for dispensation under Section 20ZA of the Act when the extent of the works required became apparent. The Applicant confirmed that this was because the works affected only one property and Mr and Mrs Prestidge were in a difficult situation with regard to the impending birth of their daughter. The Applicant did not believe it would have been reasonable to expect Mr and Mrs Prestidge to suffer further by making them wait for what it was thought were essentially relatively minor works.

8.17 The Respondents submitted that it was still not known if the works carried out were satisfactory or not.

9. THE TRIBUNAL'S DECISION

9.1 It is evident to the Tribunal that none of the Respondents who have submitted written submissions support this Application. It is also evident that there is general agreement that further works are required. However, the Tribunal must have regard to the case of Daejan Investments Ltd –v- Benson (2013) UKSC14, (2013) HLR21.

9.2 The purpose of the Consultation Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate. As such, the issue on which the Tribunal should focus when entertaining an application under the Landlord & Tenant Act 1985 S.20ZA (1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Consultation Requirements. Thus, the main, indeed normally, the sole question for the Tribunal when considering how to exercise its jurisdiction under the Landlord & Tenant Act 1985 S.20ZA(1) is the real prejudice to the tenants flowing from the landlord's breach of the Consultation Requirements.

9.3 The legal burden of proof in applications for dispensation remains throughout on the landlord but the factual burden of identifying 'relevant' prejudice that they would or might have suffered caused by the landlord's failure to consult is on the tenants. It is clear that 'relevant' prejudice appears to be limited to 'financial' prejudice. It means whether non-compliance with the Consultation Requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard. In other words, whether the non-compliance has, in that sense caused prejudice to the tenant. Where works are extensive, it may be necessary for the tenant to obtain expert evidence from a quantity surveyor.

9.4 Where the tenants are not given the requisite opportunity to make representations about proposed works to the landlord, the tenants have to identify what they would have said. In some cases, it may be necessary for a tenant to instruct a surveyor to assist identify what could have been said.

9.5 The Tribunal is satisfied on the information provided that it is reasonable to dispense with the consultation requirements in this case subject to certain conditions. At the time the works were being undertaken, the Applicant was under considerable pressure from Mr and Mrs Prestidge (as evidenced by the numerous emails contained in the submissions) to undertake the works quickly. Although ideally, the Applicant, through their managing agent, should have sought to resolve the issues thoroughly by reference to an architects or surveyors report, they were clearly concerned to try and resolve matters as quickly as possible due to the personal circumstances of Mr and Mrs Prestidge.

9.6 The Tribunal therefore determine that it is reasonable to grant a dispensation in this case subject to the following conditions:

(i) That Christopher Thomas Architects be instructed to prepare a report on the work previously undertaken to date and advise whether or not any of the works now contemplated are in any way repairs to works, which have already been completed between 2010 and 2012.

(ii) If any of the works identified, which either have not been carried out to a satisfactory standard or require repair, then Christopher Thomas Architects will specify the cost/value of those works.

(iii) Any costs identified in (i) and (ii) above will be deducted from the service charges payable by all the leaseholders.

(iv) The cost of preparing the report by Christopher Thomas Architects detailed in (i) above, will not be charged to the service charge account but will be paid for in full by the Applicant.

(v) None of the costs of the Applicant, it's Agent or Representative in attending either the inspection, the Hearing on 16th April 2014, the Hearing on 1st August 2014 or preparing any submissions for the Tribunal will form part of the service charge account and as such, will not be charged to the leaseholders.

9.7 This Dispensation will take effect only when the landlord has complied with these terms and conditions.

9.8 This Determination does not give or imply any judgement about the reasonableness of the works, which have been undertaken or the cost of such works. As such, any party is at liberty to make an application under Sections 27A (and 19) of the Act for a determination as to the reasonableness of, and liability to pay, the service charges demanded.

10. APPEAL

10.1 If either party is dissatisfied with this Decision, they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made within 28 days of this Decision (Rule 52(2)) of the Tribunal procedure (First-tier Property Chamber) Rule 2013).

Graham Freckelton FRICS
Chairman
First-Tier Tribunal Property Chamber (Residential Property)

20 AUG 2014