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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference	CHI/21UD/LDC/2014/0012
Property	28 Magdalen Road St Leonards on Sea East Sussex TN37 6EG
Applicant	Mr Barry Markham
Respondents	Mr Lilley First Floor Flat Mr Bailey Third Floor Flat
Type of Application	S20ZA of the Landlord and Tenant Act 1985 as amended ("the Act")
Tribunal Members	Judge R.T.A. Wilson (Chair) Mr Roger Wilkey FRICS (Surveyor Member)
Date and Venue of Hearing	16th April 2014 Best Western Royal Victoria Hotel St Leonards on Sea
Date of Decision	16th April 2014
Date of Reasons	7th May 2014

DECISION

Procedural Matters

1. The Tribunal had before it an application made by the Applicant freeholder pursuant to S.20ZA of the Landlord and Tenant Act 1985 (as amended) (“the Act”) seeking an order granting dispensation from all of the consultation requirements in relation to external works carried out to the rear elevation of the Property and works to be carried out to the interior of the top floor flat all of which are more particularly described in the Schedule hereto (the Works).
2. By an order dated the 25th March 2014 the Tribunal gave directions for the application to proceed by way of a hearing. The directions provided that if any of the Respondents wished to contest the application they were to write to the Applicant and the Tribunal setting out their reasons for objecting to an order being made. In addition they were invited to attend the hearing of the application.
3. The Applicant’s case was set out in his application to the Tribunal, which he developed orally at the hearing. Mr Markham also brought to the hearing a Schedule of the work, which was the subject of the application.
4. Mr Lilley the leaseholder of the FFF had written to the Tribunal supporting the landlord’s application insofar as it related to the erection of scaffolding in order to investigate the cause of the roof defect. No other leaseholder had responded and there was no attendance by or on behalf of any leaseholder at the hearing.

Inspection

5. The Tribunal inspected the Property immediately before the Hearing in the presence of the Applicant.
6. The Property is a mid terrace four storey building with basement originally constructed in the Victorian era as a single residential house and subsequently converted into 5 self contained flats. The Tribunal inspected the rear bedroom of the top flat, which was situated in the rear addition of the building. This addition has a pitched roof, which has been recovered with interlocking concrete tiles. The Tribunal noticed blackening to the remains of the chimneybreast, which has been corbelled back and there was also blackening to the adjacent wall and ceiling areas. The Tribunal also noticed damp staining to the bedroom ceiling.
7. The Tribunal could see the exterior of the roof and chimney stack above the bedroom from the kitchen of the top flat and noted recent work carried out to this area which appeared to correspond with the Works as described in the Schedule to this decision.

The Law

8. By section 20 of the Act and regulations made thereunder (the Regulations) where there are qualifying works or the lessor enters into a qualifying long

term agreement, there are limits on the amount recoverable from each lessee by way of service charge unless the consultation requirements have been either complied with, or dispensed with by the Tribunal. In the absence of any required consultation, the limit on recovery is £250.00 per lessee in respect of qualifying works, and £100.00 per lessee in each accounting period in respect of long term agreements.

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 not to each set of works, as had been the previous practice, but as applying to all qualifying works carried out in each service charge contribution period. This decision is currently subject to an appeal, which has yet to be heard.
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 Limited v Benson et al* [2013] UKSC 14. (Daejan) 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.

The Hearing

The Applicant's case.

11. At the hearing Mr Markham explained the background to the application. In the last two weeks of December 2013 he had been contacted by the tenant of the top floor flat who reported that the roof was leaking. There followed a short period before Mr Markham had been able to gain access to the flat. When he did gain entry it was obvious that something urgent needed to be done to stop the water penetration. He anticipated the cost of the works would exceed the threshold for consultation and he had therefore tried to get the leaseholders to allow emergency works to be carried out without consultation but this had not proved possible. One of the leaseholders had only given conditional consent and the other leaseholder, Mr Bailey, would not agree.
12. Mr Markham told the Tribunal that early in January 2014 he carried out a further inspection of the top floor flat which revealed that the water ingress had got worse and water was now flowing through the roof and being collected in a suitcase. It was obvious that emergency work needed to be carried out immediately. Accordingly he instructed 1066 Property Maintenance Company (1066) to carry out what work was necessary to stop the water leak. 1066 was a

company that he had used on a number of previous occasions and he had confidence in their ability to carry out the necessary work to a reasonable standard and at a reasonable cost. In the event the works carried out were those described in Part 1 of the Schedule. He had not as yet received an invoice for the works but believed that the scaffolding would cost in the region of £3,000 with the cost of the work somewhere between £2,000 and £3,000.

13. If the Tribunal gave its consent Mr Markham confirmed that the remedial work to the top floor flat as described in Part 2 of the Schedule would be progressed quickly so that the tenant could once again enjoy proper occupation of the flat.
14. Mr Markham contended that the work carried out was necessary and could not be delayed. He also contended that none of the leaseholders had been prejudiced by the lack of consultation and the fact that no leaseholder had attended the hearing was indicative that they did not object. In these circumstances he invited the Tribunal to grant a dispensation order covering the Part 1 works, and also the Part 2 works.

Consideration

15. The only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. **This application does not concern the issue of whether any service charge costs will be reasonable or payable.**
16. The Tribunal first considered the terms of the lease contained in the hearing bundle and in particular the repairing covenants in so far as they relate to the repair of the roof and the structure of the building. The lease places an obligation on the Applicant to repair and if necessary to replace the roof and structure of the building and the Respondents are obliged to contribute towards the cost by virtue of the service charge provisions of the lease.
17. The Tribunal is thus satisfied that the roof repair works do constitute "qualifying works" within the meaning of the Act. Furthermore as the contribution required from each Respondent pursuant to the service charge provisions in their leases will exceed the threshold of £250, there is an obligation on the Applicant under Regulation 6 to consult in accordance with the procedures set out in the Regulations.
18. The evidence put before the Tribunal establishes that the roof of the property failed in the months leading up to December 2013 with the result that the top floor flat was suffering from sustained water penetration causing internal damage. The Tribunal is satisfied that the work carried out thus far has been necessary and proportionate. It was clearly not in the best interests of the Respondents to have allowed the roof to continue leaking for at least three months, which would have been the case if statutory consultation were carried out prior to execution of the Works.

19. On balance the Tribunal is also satisfied that it would not be sensible to delay the interior works to the top floor flat as described in Part 2 of the Schedule. These works are of a relatively minor nature but are necessary to enable the tenant of the flat to have quiet enjoyment and proper use of the accommodation. The Tribunal can detect no prejudice by forgoing consultation in respect of these works.
20. The approach to be taken by the Tribunal in exercising its discretion on this application is that laid down in Daejan. In Daejan it was held that the sole question for the Tribunal to consider, when exercising its discretion in an application for dispensation, is the prejudice to the tenants flowing from the landlord's breach of the consultation requirements and that the factual burden of identifying prejudice is on the tenants.
21. The Tribunal has carefully considered all the evidence available to it and has concluded that there is no evidence that the Respondents have individually or collectively been prejudiced by the lack of consultation. There is no evidence that the Respondents are being asked to pay for inappropriate work, or more work than was actually done, or are being charged inappropriate amounts.
22. The Respondents were given the opportunity to attend the hearing of the application and tell the Tribunal what they might have said had compliant consultation taken place, but none attended.
23. Because the Respondents have not been able to establish any case of prejudice, the Tribunal is satisfied that it is reasonable for it to grant dispensation from all the consultation requirements of S.20 (1) of the Act in respect of the Works and it so determines.
24. The Tribunal makes it clear that this dispensation relates solely to the requirement 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 Respondents under S.27A of the Act to deal with the resultant service charges. It simply removes the cap on the recoverable service charges that S.20 would otherwise have placed upon them.

Schedule of Works

Part 1

Works undertaken:

Erect scaffolding to four floors on the rear elevation on two sides of extension
Remove existing fascia board and guttering
Remove existing three rows of tiles, battening and felt
Renew battens, and felt and replace tiles, renewing where necessary
Renew fascia board
Renew guttering
Replace damaged and missing tiles around chimney
Refit existing lead flashing around chimney

Remove and replace (where necessary) gable end tiles, cementing in place
Flexacryl chimneybreast
Clear all rubbish from site
Remove scaffolding

Part 2

Works be to be undertaken:

Second Floor Flat
28 Magdalen Road, St Leonards On Sea, East Sussex, TN37 6EG

Remove damaged plasterboard to damaged walls and ceiling in bedroom
Assess plasterboard battening and renew if necessary
Replace plasterboard
Skim finish
Apply mist coat and two coats of emulsion
Clear all rubbish from site

Judge RTA Wilson

Dated 7th May 2014

Appeals

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.

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.

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.

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.

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.