99 49

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LDC/2013/0145**
Property	:	**2-8 Hyde Park Gardens W2 2LT**
Applicant	:	**Church Commissioners for England**
Representative	:	**Ms C Crampin**
Respondents	:	**The long leaseholders of 2-8 Hyde Park Gardens W2 2LT**
Representatives	:	**Miss C Garnham** **Mr H Turner**
Type of application	:	**To dispense with the requirement to consult leaseholders regarding additional external works**
Tribunal	:	**Mr M Martynski (Tribunal Judge)** **Miss M Krisko BSc (EstMan) BA FRICS**
Date of hearing	:	**21 May 2014**

DECISION

Decision summary.

1. The Tribunal grants dispensation from the consultation requirements set out in section 20 Landlord and Tenant Act 1985 (and the regulations made thereunder) in respect of the external works to 2-8 Hyde Park Gardens which were originally the subject of a consultation notice dated 2 June 2011 and completed in 2014.

2. This is subject to the provisional condition that no proceedings are taken against any leaseholder in respect of any unpaid Service Charge in connection with the works mentioned prior to 9 September 2014. The parties have the right to make further submissions on this proposed condition as set out at the end of this decision.

3. The parties are invited to make further written submissions on the question of costs and further directions regarding this are set out below.

Background

4. In an application dated 11 December 2013, the Applicant asked the tribunal to dispense with the requirement to go through the statutory consultation process with the Respondents regarding additional works of repair and decoration (value in the region of £162,000) that the Applicants say have become necessary to the building at 2-8 Hyde Park Gardens. There was full consultation regarding the original external works of repair and decoration.

5. Directions on the application were given on 18 December 2013. Those directions stated that the application would be considered on the papers alone without a hearing.

6. The Applicant submitted a bundle of papers in support of the application. There was in addition a response from Ms Garnham of Flat 4 opposing the application.

7. A tribunal considered the application on the papers but felt unable to make a decision because, in its view, the Applicant had provided too few details and further, what detail it did provide, was far from clear.

8. Further directions were given for the matter to be considered at an oral hearing.

9. Further written submissions were made by the Applicant and by Miss Garnham for the hearing.

The Applicant's case

10. In further written evidence submitted to the tribunal, the Applicant set out in some detail the extra work that had been carried out by way of external

repair and decoration over and above that originally consulted upon and gave reasons why that extra work could not have been foreseen.

11. Upon considering the additional written evidence from the Applicant we formed the initial view that there appeared to be good reason why some of the additional works could not have been foreseen; For example works that became apparent after layers of external material were stripped back and a chimney that was found to be in need of major repair after close examination following the erection of scaffolding.

12. However we were less convinced in respect of other items. For example, whilst we accept that the extent of render repair required could only be estimated prior to scaffolding being erected and extensive hammer testing carried out, it was likely that on such a large building covered with such a large amount of render, given that building had not been decorated for some time, the amount of render repair would have been extensive and a very generous provision for extensive render repairs could have been put in the original specification. As for scaffolding, we were not convinced that it was not possible to anticipate the issues regarding the complexities of scaffolding at the building.

13. Mr DeVere-Catt, giving evidence to the Tribunal on behalf of the Applicant, admitted that in at least one respect (that being roof tiles), the original specification of works underestimated the amount of work/materials that was likely.

14. However, in the hearing we did not explore in detail all possible failings of the original specification because we concentrated on the issue of prejudice (which is dealt with below). Accordingly the question as to the adequacy of the original specification remains open and we make no formal findings regarding that issue.

The question of prejudice

15. When dealing with an application of this kind a First-tier tribunal is obliged follow the guidance set out by the Supreme Court in the recent decision of *Daejan Investments Limited v Benson and others* [2013] UKSC 14. In that case, the court said:-

> Given that 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, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 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 requirements.
> [Lord Neuberger at paragraph 44]

> As to the contention that my conclusion would place an unfair burden on tenants where the LVT is considering prejudice, it is true that, while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants. However, given that the landlord will have failed to comply with the requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, for instance like

> resolving in their favour any doubts as to whether the works would have cost less (or for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants have been given a proper opportunity to make their points.....
> [Lord Neuberger at paragraph 67]

16. In her written submissions, in which she gave reasons why she opposed the application for dispensation, Miss Garnham did not address directly the question of the prejudice that she and/or other leaseholders would suffer if dispensation were granted.

17. We asked Miss Garnham and Mr Turner at the hearing to explain what prejudice they would suffer if dispensation were granted. They explained that:-
(a) they felt they were being 'bumped' into a large amount of additional works (although they conceded that these works were necessary)
(b) the cost of the works as originally estimated would have been more or less covered by the amount of the reserve fund - the cost of the additional work not consulted on would have to be paid for by a further call on leaseholders, had they been consulted regarding the extra works in the first place, they would have objected to paying for them on the grounds that the works required to the building were more extensive than they should have been due to the fact that the building had been neglected over the years (historic neglect)
(c) now that the works had been largely completed, leaseholders had lost the opportunity to establish what works were only necessary due to historic neglect and so may be now unable to argue that some costs were not payable by them
(d) demands were now being made of leaseholders for their contribution to the costs of the additional works, this has put leaseholders on the back foot, had they been consulted regarding all the works at the outset, they would have argued at that time that they should not be responsible for the full cost prior to any demand for extra funds being put to them
(e) they may now have to make their own application regarding the work and the cost of that work under section 27A Landlord and Tenant Act 1985

The Tribunal's conclusions

18. We accept that, in respect of some of the additional works at least, the failure to consult was not due to the fault of the Applicant inasmuch as some of the works that were necessary were not foreseeable. We accept that all the works carried out were necessary.

19. We also accept that the leaseholders have been prejudiced by the lack of consultation. It is possible that the lack of consultation and the fact that the works have now been completed will make the task of establishing a case of historic neglect more difficult for the leaseholders. It must also be the case that, tactically, the leaseholders are now on the back foot facing demands from the landlord for contributions to the costs of the work when they have not yet got the evidence for the historic neglect case.

20. However, in our experience, whilst it is not ideal, it is perfectly possible for a Building Surveyor, properly instructed and suitably qualified, to form an expert opinion as to whether works to a building were only required due to historic neglect without having had the opportunity of inspecting the building prior to those works/repairs.

21. Further, it appears from the evidence before us that there was a good deal of concern amongst leaseholders regarding the alleged neglect of the building prior to the current works being carried out. We were informed of at least one leaseholder being involved in litigation with the Applicant over this question. Mr Turner had also been in litigation regarding repairs at the building with the Applicant (although not directly on the historic neglect issue). It seems to us therefore that the leaseholders were alive to the issues of neglect prior to the works being carried out and that there may have been evidence already gathered on this question.

22. We note as well that when the original consultation process took place, no written observations were made by leaseholders.

23. We do not have the necessary evidence in this application to form any sensible view on the historic neglect argument or its possible value.

24. In summary, there does not appear to be a dispute that the additional works were necessary. There remains a question as to whether it would have been possible for the landlord to properly consult on the additional works and there is a question as to whether or not the leaseholders have a valid ground to argue that they should not be responsible for the cost of some of the works due to the historic neglect issue.

25. It would not be reasonable in our view to refuse dispensation. The result of such a decision would be to deprive the Applicant of a very large sum of money in circumstances where we do not have the evidence to form a judgment as to whether those costs, or all of them, are properly payable by the leaseholders.

26. We considered carefully if there were any conditions (apart from costs dealt with below) that could sensibly be put on the grant of dispensation, no party was able to suggest any such conditions at the hearing. On considering the matter further, in order to meet some of the concern and prejudice caused to the leaseholders, we propose to make it a condition of dispensation that no proceedings are taken against any leaseholder in respect of any unpaid Service Charge in connection with the works mentioned prior to 9 September 2014 in order to allow the leaseholders to fully consider their position, and possible action, regarding the historic neglect issue.

Costs and further directions

27. No specific application was made by the leaseholders as to costs. There are two potential costs issues arising from this application and our decision on it as follows:-

(a) should the Tribunal make an order that none of the costs incurred in this application be added to the Service Charge?
(b) have the leaseholders incurred any costs as a result of this application and if so, should those costs be paid by the Applicant as a condition of the dispensation?

28. We are minded to make an order that none of the costs incurred in this application be added to the Service Charge given that this is an application that has had to be made due to no fault on the part of the leaseholders and which may have been necessary due to, in part at least, some fault on the part of the Applicant.

29. Given that these costs issues were not raised in full at the hearing due to lack of time and to allow the parties the chance to comment on the proposed condition to be attached to the dispensation, we shall allow the parties a further opportunity to make written comments as follows:-

(a) by no later than 28 June 2014;
   i. the leaseholders may send to the tribunal and to the Applicant's solicitors details of any costs in dealing with this application that they wish to claim
   ii. the Applicant may send to the leaseholders and to the tribunal any comments it has if it wishes to oppose the proposed condition to be attached to the grant of dispensation

(b) by no later than 12 July 2014 the Applicant may send to the tribunal and to the leaseholders a response on all costs questions

30. If any written submissions are made, we will consider these after 12 July 2014 and send our decision to the parties.

Mark Martynski, Tribunal Judge
9 June 2014