11906

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AZ/LDC/2016/0042**
Property	:	**304B Stanstead Road, London SE6 4XD**
Applicant	:	**Hexagon Housing Association Limited**
Representative	:	**Marsons Solicitors LLP**
Respondent	:	**Ms Rachel Owen**
Representative	:	**In person**
Type of Application	:	**To dispense with the requirement to consult lessees about major works**
Tribunal Members	:	**Mr Jeremy Donegan (Tribunal Judge)** **Mr Duncan Jagger FRICS (Valuation Member)**
Date and venue of Determination	:	**07 June 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**08 June 2016**

DECISION

Decision of the tribunal

The tribunal refuses the application for dispensation relating to roof repairs ('the Qualifying Works') undertaken at 304 Stanstead Road, London SE6 4XD ('the Building') in November 2014.

The application

1. The tribunal received an application for dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') on 03 May 2016 and directions were issued on 06 May 2016.

2. The directions provided that the case would be determined upon the basis of written representations, unless either of the parties requested an oral hearing within 7 days. There has been no request for an oral hearing and the paper determination took place on 06 June 2016.

3. The relevant legal provisions are set out in the Appendix to this decision.

The background

4. The Building is an end of terrace house that has been converted into two self-contained flats. The Applicant is the freeholder of the Building. The Respondent is the long leasehold of 304B Stanstead Road ('the Flat'), which is a maisonette on the first and second floors of the Building. The service charge proportion for the Flat is 50%.

5. The Applicant claims that its contractor, RR Richardson, undertook 5 repairs to the roof at the Building between 03 January and 27 June 2014, in response to complaints of water ingress from the Applicant. The Respondent accepts that she complained of a roof leak but does not accept that any roof repairs were undertaken in this period.

6. In an email dated 03 September 2014, the Respondent's mother (Dr C Owen) complained about the Applicant's handling of the roof leak and stated that the dampness in the Flat was continuing and worsening. She also stated that the damp was affecting the internal decorations and raised concerns as to the impact of the damp on her daughter's health.

7. Mr John Cross, the Applicant's Property Services Director, responded in an email dated 04 September 2014. He stated that a roofing specialist would be attending the Building the following day to identify the source of the water ingress, with a view to fixing it. That email referred to the statutory consultation procedure under section 20 of the 1985 Act. Mr Cross expressed the view that the repairs should *"...be minor not major"* and went on to say:

"In this case what I am proposing to do is to get the specialist to look at the problem and undertake a temporary repair to stop the leak and any further damage and any costs for this will be limited to the £250 per individual tenancy.

Once I get the full picture from the specialist we will be able to confirm the extent of the problem and if a temporary repair will bring a limited timeframe of relief, or if they can resolve it once and for all, in which case there will be no need for a full section 20 process and increasing costs (where we will get competitive quotes from three contractors to start the consultation period per se.) I personally hope it is the latter where it can be fixed quickly and simply.

What ever (sic) the outcome we will keep you both fully informed."

8. The Applicant instructed an alternative contractor, K Martin Builders Limited ('KMBL'), to inspect the roof. A schedule of works was prepared on 17 October 2014. On 24 October 2014, the Applicant and KMBL entered into a JCT agreement for these works. The agreed contract sum was £7,033 (plus VAT).

9. In its written representations, the Applicant stated that the schedule of works was copied to the Respondent. Its solicitors corrected this statement in a letter to the tribunal dated 03 June 2016, in which they said:

"A copy of the schedule was not in fact sent to the Respondent. However, on 13th November 2014 the Applicant's surveyor, Lloyd Morgan, sent the Respondent an email providing details of the proposed roof works."

10. Mr Morgan's email stated that the works would entail:

"1. Chimney Stack- Re-point complete including cheeks front & Rear&Rear (sic)

2. Remove and re-bed coping stones – Flank Wall

3. Repairs to parapet walls upstands

4. Application of Masonry Protection Cream – Various Areas."

11. Mr Morgan issued a final certificate for the Qualifying Works on 09 December 2014. The adjusted contract sum was £8,323 plus VAT (total £9,987.60). In an email dated 11 December 2014, Mr Morgan informed the Respondent that the "*roofing works are complete*". That email gave further details of the works.

12. Mr Morgan notified the Respondent of the amount of the final account in an email dated 03 February 2015. The Respondent's contribution to was stated to be £4,993.80 (including VAT). Further email correspondence followed but some of the emails sent by the Respondent were not received, as they were incorrectly addressed.

13. In an email to Mr Morgan dated 07 October 2015; the Respondent pointed out there had been no section 20 consultation for the Qualifying Works. She also referred to the email from Mr Cross dated 04 September 2014 and the statutory cap of £250 that applies where no consultation takes place (unless there is dispensation).

14. The Applicant accepts there was no statutory consultation before it embarked on the Qualifying Works and seeks retrospective dispensation.

The parties' representations

15. The Applicant set out the grounds for seeking dispensation on page 8 of the application form and in a two-page document headed "*THE APPLICANT'S REPRESENTATIONS*", submitted to the tribunal on 20 May 2016. This was accompanied by a substantial bundle of correspondence and documents that ran to 606 pages.

16. The Applicant's representations incorrectly stated that the Respondent has been supplied with the schedule of works and went on to say she "*...would (or should) have been aware that a patch repair to the roof would not be sufficient to resolve the ongoing problem of water ingress*". It also explained that the Respondent was in regular contact with the Applicant and KMBL before, during and after the Qualifying Works.

17. The Applicant claims that it was not feasible to engage the section 20 consultation, as this would have delayed the commencement of the Qualifying Works which would not have been welcomed by the Respondent. It also alleges that the Respondent has suffered no prejudice arising from the failure to consult, relying on the Supreme Court's decision in ***Daejan Limited v Benson & Others [2013] UKSC14***.

18. The Respondent set out her objections to the application in a ten-page document headed "*THE RESPONDENT'S RESPONSE*" that was accompanied by various appendices. This disputed some of the factual background to the dispute and made various criticisms of the Applicant's handling of the Qualifying Works. In particular she referred to the failure to undertake temporary repairs (below the section 20 threshold) in accordance with the email from Mr Cross of 04 September 2015 and the poor communication from the Applicant. She

also pointed out that the Applicant did not treat the Qualifying Works as being of an emergency nature.

19. The Respondent says it is impossible to assess the prejudice she has suffered, as she has not been supplied with a full breakdown of the cost of the Qualifying Works. However she disputes the scope of the works and the causes of the water ingress. She has suffered considerable personal and legal expense. The Applicant has failed to make good the internal damage to the Flat caused by the water ingress. In addition the Respondent has incurred legal fees of £360 (including VAT), in obtaining advice on the dispute.

The tribunal's decision

20. The tribunal is not satisfied that it is reasonable to dispense with the consultation requirements in section 20 of the 1985 Act and refuses the dispensation application.

Reasons for the tribunal's decision

21. The Respondent has been prejudiced by the Applicant's failure to consult in that she has lost the opportunity to object to the Qualifying Works, nominate her own contractor, obtain independent advice or suggest alternative repairs. The Applicant did not provide her with details of the cost or scope of the works before instructing KMBL.

22. Based on Mr Cross' email of 4 September 2014, it was reasonable for the Respondent to assume that her contribution to the cost of the works would be no more than £250. The actual sum being demanded from her is almost twenty times this sum. The suggestion that the Applicant would or should have known that extensive repairs were required does not stand up to scrutiny. She was not supplied with the schedule of works or any estimates, so had no way of knowing that the costs would exceed the statutory threshold. Mr Morgan's email of 13 November 2014 was sent long after the works started and gave no details of the anticipated costs. Had the Respondent been informed of the extensive nature of the works then she could have investigated the scope and cost of the works. She was deprived of this opportunity.

23. The tribunal rejects the argument that it was not feasible to follow the statutory consultation. There had been water ingress in the Flat since January 2014, if not before. There was no evidence to establish that the Qualifying Works were so urgent in October 2014 that they had to be undertaken immediately. Further this is contrary to the email from Mr Cross. As far as the Respondent was concerned, the Applicant was going to undertake minor repairs below the consultation threshold.

24. The Applicant acted prematurely and unreasonably by instructing KMBL to undertake extensive repairs, without consulting the Respondent. This was completely contrary to the email from Mr Cross. The tribunal had regard to the guidance on the correct approach to prejudice, set out at paragraphs 65-69 of the decision in ***Daejan***. The Applicant's conduct has been egregious and the tribunal is satisfied that the Respondent has suffered real prejudice. Accordingly it refuses the application for dispensation.

Name: Tribunal Judge Donegan **Date** 08 June 2016

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all of 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.