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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/18UG/LDC/2013/0055
Property:	21 Morton Crescent, Exmouth, Devon EX8 1BG
Applicant:	Joyce Ogden and Charles Kibble
Representative:	Ms J Ogden
Respondent:	Vanessa Freeman
Representative:	Ms V Freeman
Type of Application:	Section 20ZA of the Landlord and Tenant Act 1985 (Landlord's application for the dispensation of all or any of the consultation requirements contained in Section 20 Landlord and Tenant Act 1985)
Tribunal Members:	Judge A Cresswell (Chairman) Mr E G Harrison FRICS
Date and venue of Hearing:	17 December 2013 at Exeter
Date of Decision:	24 December 2013

DECISION

The Application

1. On 21 October 2013, Joyce Ogden and Charles Kibble, the owners of the freehold interest in the property, 21 Morton Crescent, Exmouth, made an application to the Tribunal for the determination of an application for the dispensation of all or any of the consultation requirements contained in Section 20 Landlord and Tenant Act 1985 in respect of works to the roof, front door and external decorative works at the property.

Preliminary Issues

2. The application here is a discreet application seeking dispensation from the consultation requirements referred to above. The jurisdiction of this Tribunal on such an application is similarly discreet. The Tribunal's consideration was somewhat complicated by the history, by the understanding of the parties of the relevant law and by the fact that there appears to be a state of complete disharmony between the parties. The determination does not dwell on those extraneous issues and ignores them insofar as they are irrelevant to its consideration of the discreet application.

Inspection and Description of Property

3. The Tribunal inspected the property on 17 December 2013 at 1000. Present at that time were Ms Ogden, Mr Kibble and Ms Freeman. The property in question comprises a four-storey house, together with a three-storey rear wing with a small single storey lean-to at the rear. The conversion into four flats probably took place in the 1960s. The property was constructed in the Victorian era and lies in a long terrace of similar properties. It is situated on a level site with a southwesterly aspect at the front overlooking the seafront.

4. The construction appears to be in brick with rendering on the front facade which has been painted. The roofs are clad with new slates with the exception of the single storey lean-to which appears to have an old slate covering which has been overcoated with bitumen and nylon netting.

Summary Decision

5. This case arises out of the Landlord's application for the dispensation of all or any of the consultation requirements contained in Section 20 Landlord and Tenant Act 1985 in respect of works to the roof, front door and external decorative works at the property. Under Section 20ZA of the Landlord and Tenant Act 1985 (as amended), the Tribunal has jurisdiction to make a determination dispensing with all or any of the consultation requirements "if satisfied that it is reasonable to dispense with the requirements." The Tribunal has determined that the landlord has demonstrated that it is reasonable to dispense with the requirements, and for that reason does make a determination dispensing with all of the consultation requirements.

Directions

6. Directions were issued on 29 October 2013. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration. Respondents wishing to contest this application were advised to attend the hearing when they would be given an opportunity to be heard.

7. This determination is made in the light of the documentation submitted in response to those directions and the evidence and oral representations received at the hearing.

The Law

8. The relevant law is set out in sections 18, 19, 20 and 20ZA of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002. Under Section 20ZA of the Landlord and Tenant Act 1985 (as amended), the Tribunal has jurisdiction to make a determination dispensing with all or any of the consultation requirements "if satisfied that it is reasonable to dispense with the requirements." The Tribunal has been given guidance by the Supreme Court also in **Daejan Properties Ltd v Benson** (2013) UKSC 14.

9. The relevant law the Tribunal took account of in reaching its decision is set out below:

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002:

Section 18 deals with the meaning of "service charge" and "relevant costs"

Section 19 details the limitation of service charges and reasonableness.

20 Limitation of service charges: consultation requirements
(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) a residential property 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 accordance with, the regulations is limited to the amount so prescribed or determined.

20ZA. Consultation requirements: supplementary
(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or 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.
(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.
(5) Regulations may in particular include provision requiring the landlord—
(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
(b) to obtain estimates for proposed works or agreements,
(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.
Daejan Investments Limited v Benson and others [2013] UKSC 14:
The correct question is whether, if dispensation was granted, the respondents would suffer any relevant prejudice, and, if so, what

relevant prejudice, as a result of the failure to comply with the Requirements.

The purpose of the Requirements is to ensure that tenants are protected from paying for inappropriate works, or paying more than would be appropriate.

In considering dispensation requests, the LVT should focus on whether the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.

The Requirements are a means to the end of the protection of tenants in relation to service charges. There is no justification for treating consultation and transparency as appropriate ends in themselves. The right to be consulted is not a free-standing right. As regards compliance with the Requirements, it is neither convenient nor sensible to distinguish between a serious failing, and a minor oversight, save in relation to the prejudice it causes. Such a distinction could lead to uncertainty, and to inappropriate and unpredictable outcomes.

The LVT has power to grant dispensation on appropriate terms, and can impose conditions on the grant of dispensation, including a condition as to costs that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application.

Where a landlord has failed to comply with the Requirements, there may often be a dispute as to whether the tenants would relevantly suffer if an unconditional dispensation was granted. ***While the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants. They have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it and should be sympathetic to the tenants' case.***

Insofar as the tenants will suffer relevant prejudice, the LVT should, in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed to compensate the tenants fully for that prejudice. This is a fair outcome, as the tenants will be in the same position as if the Requirements have been satisfied.

This conclusion does not enable a landlord to buy its way out of having failed to comply with the Requirements, because a landlord faces significant disadvantages for non-compliance. This conclusion achieves a fair balance between ensuring that tenants do not receive a windfall, and that landlords are not cavalier about observing the Requirements strictly.

Austerberry v Corporation of Oldham (1885) 29 CH D 750: The burden of a covenant does not run with the land: "*A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it*" per Lindley J.

This was reaffirmed by the House of Lords in **Rhone v Stephens** [1994] 2 All ER 65.

Ownership and Management

10. The Applicants are the owners of the freehold of the property and retain 3 of the 4 flats at the property. The Respondent is the owner of the leasehold interest in the basement flat.

The Lease

11. The lease before the tribunal is a lease dated 19 October 1964, which was made between Dorothy Frances Dubois as lessor and Edwina Mary Geach as lessee.

The Applicant's Case

12. Ms Ogden explained that the Applicants had purchased the freehold on 18 May 2012, having already owned the top floor flat, middle floor flat since January 2012, and acquiring the ground floor flat also in May 2012. Ms Ogden explained that, with the purchase of the leasehold interests in two of the flats in January 2012, they were met by the Respondent, who detailed the faults in the building.

13. Ms Ogden explained that it was apparent that the roof was "*in dire need of repair*" as there was water ingress to a bedroom. She was aware that the respondent had undertaken a mediation process with the previous owner and that work was identified during that process as being required to the roof and front of the building. She was aware that a schedule of works had been established at the mediation process.

14. Ms Ogden believed that it had been important to make the property waterproof and showed pictures of the slates and of plaster which had come from the front of the building and some of which was removed for reasons of safety.

15. The Applicants decided to re-roof the main roof of the property and to also renew the guttering. On 10 May 2012, Ms Ogden wrote to the Respondent to inform her that she would be bringing estimates for proposed works for the Respondent to look over and asked the Respondent if she knew anybody else who could give an estimate. "*We need to get this sorted as fast as possible and so would appreciate any help.*" Ms Ogden indicated that no proper response was received from the Respondent.

16. Ms Ogden indicated that she had sent 3 estimates to the Respondent on 4 July 2012, to which the Respondent replied to say that the Applicants had not followed the proper procedure. Subsequently, the Applicants had the door shut in their faces by the Respondent.

17. The Applicants chose the cheapest estimates, being M A Leek, for the roof, guttering and decorative work and Monarch Windows to replace the front door which was leaking. Mr Leek had re-roofed next door, No 20, and came highly recommended by the people there. The Applicants looked at his work and felt it was of a reasonable standard. Although they had no knowledge of Monarch Windows, the company was CERTASS registered and gave a 10-year warranty.

18. Scaffolding was erected on 8 August 2012, after which Mr Leek confirmed the urgency of the work. As it turned out, there was a severe storm on 15/16 August 2012 and initial work meant that the building was watertight. Works were completed by the end of August 2012.

19. When invoices were sent to the Respondent with a request that she pay one quarter, the Respondent replied that she was not liable for the cost as she had not authorised the work and the Applicants had not gone through the correct procedure. The Respondent was concerned that the Applicants had not gone through the schedule of work and Ms Ogden told her that the Applicants were doing the urgent work first and would meet with her in the autumn to discuss further works.

20. The Tribunal also heard from Mark Andrew Leek, the builder, who told the Tribunal that he had observed problems with the roof some 2 years previously when he had worked on No 20. He had been able to lift the whole corner of the roof off the battens as a result of nail rot.

21. Ms Ogden informed the Tribunal that the Applicants had paid for the Velux window in the new roof and sought no contribution from the Respondent for that work.

The Respondent's Case

22. Ms Freeman told the Tribunal that works were required to the building. She had been involved in lengthy litigation with the previous freeholders in relation to dry rot and damp. The previous freeholders had accepted a surveyor's schedule of works and Ms Freeman had been told by her solicitor that the mediation agreement reached was binding on future freeholders. She had received similar advice from the Leasehold Advisory Service. She felt that she had been set back to the beginning as previous works identified had been put to one side.

23. She agreed that the works which were done were required, but not that they were urgent and stated that Mr Leek could have caused the damage to the roof seen in the photographs. She said that the price had been around £7000 in 2009/2010 for the roof works.

24. She agreed that the front door required replacement, but that this was not urgent work.

25. She agreed that she had seen the 3 estimates on 4 July 2012 and did not obtain an estimate of her own.

26. She believed that there would be a need to consult the Tribunal as there would be costs attributable to historic neglect and a need to discuss who was responsible for what and in what proportions. As of 10 May 2012, the Applicants were not yet the freeholders, but they were associated with the previous freeholders and had knowledge of the building.

27. If she had been consulted, she would not have agreed to a Velux window in the roof because of the risk of future leakage. She would have wanted to contend that her contribution should have been reduced by reason of

equitable set off and that there might be a need to refer to the Tribunal for adjudication. She would have argued that any works required by scaffolding, such as the plastic rainwater goods at the rear and other works, were completed at the same time. The cost of scaffolding will have to be repeated for subsequent works.

28. Ms Freeman indicated that her surveyor had looked at the roof from the ground, but she did not share his report with the Tribunal. She agreed that she could not question the quality of the roof work.

29. In relation to the front door, she said that she would have chosen a proper fitting door and would have repaired the floor and door plinth rather than insert a plastic cover. She would also have ensured that the door was suitable for provision of a door entry system for the building.

30. She felt that the quality of the work to the façade was not adequate, but "*plastering over the cracks*". The quality of paintwork was not good as there was cracking and bubbling. Metal edging in a front wall was rusting through. The bubbling had occurred within the year. Only one coat had been applied to the front.

31. She felt that the Applicants were concentrating on aesthetics to make the building look better. The Applicants had said that it was their building and had demanded a key to her back gate. They had engendered uncertainty and mistrust. She had wanted consultation with her before they spent her money.

Consideration and Determination

32. The Tribunal finds it clear from its examination of the papers and the oral evidence that the works conducted by the Applicants were urgently required.

33. The suggestion that Mr Leek caused damage to the roof is unsupported by any evidence and an unworthy suggestion to make. It was quite clear that this was the last of the roofs in the whole terrace to be replaced and clear from the photographs that there was an urgent need for its replacement. The work also appeared in the schedule completed by Mr A Mills, the surveyor referred to in the mediation agreement.

34. It was evident too from the evidence of both parties and from the surveyor's schedule that the door required replacement too.

35. It was evident from the photographs, from the evidence of both parties and from the surveyor's schedule that works were required to the façade of the building, some plaster already having been removed for reasons of safety.

36. The Applicants as new freeholders were entitled to treat the building as if they owned it, because they did own it. The Respondent has a leasehold interest in the demised property only. It is right and proper that the Applicants as freeholder consult with leaseholders when major works are contemplated; indeed, it is a legal duty to do so. The consultation which took place went a long way towards compliance with what is required. The Respondent already knew that the works were required; she was told that there was a proposal to undertake the works; she was provided with 3 estimates and given an

opportunity to provide an estimate of her own. She chose not to provide estimates of her own and not to engage in the consultation process.

37. The Respondent refers to equitable set off, but quite clearly spurned a genuine opportunity to take part in the consultation process. She appears to have been transfixed by her history of dealings with the previous freeholder rather than focusing on the proposal by the new freeholder to complete required works at the building.

38. The Respondent said that she had been advised that the agreement which she had reached with the previous freeholder was binding upon the Applicants, but was unable to share that advice with the Tribunal. The Tribunal does not need to decide that point, but **Austerberry v Corporation of Oldham,** referred to in paragraph 9 above, would suggest that the law is against her on that point. The mediation agreement is, in any event, a rather vague document and the Tribunal could not see how what the Applicants both proposed and did could be said to be contrary to the agreement which was reached between the Respondent and the previous freeholder.

39. The Tribunal is required to apply the guidance of the Supreme Court **in Daejan Properties Limited v Benson** (2013) UKSC and finds that the tenant Respondent was not prejudiced by the failure by the landlord Applicants to consult in the circumstances that the Tribunal has found them to be. The guidance of the Supreme Court requires the Tribunal to measure the prejudice rather than simply disallow all costs above £250 per flat. The tenant here was not prejudiced because she was able to play her part in choosing the contractors for the repair the building, involving repairs which she agreed were required, and chose not to do so. As well as being fogged by the relationship with the previous freeholder, she appears to have been ill advised; there can be no set-off against the Applicants for historic neglect which should have been (and was, as she told the Tribunal) known to the Respondent when she purchased her flat in 2007. The Respondent described long term serious neglect apparent at the time of her purchase and observed that the roof required replacing, that the building required repainting and a new front door was required, all works which the Applicants addressed very soon after their purchase of the freehold. Ms Freeman told the Tribunal that she did not have an independent survey on purchase, but had relied upon the mortgage valuation report, which was not revealed as part of her case. She told the Tribunal that her flat had been empty for 2 years before the purchase and that the building had obviously been neglected.

40. The Tribunal needs to assess the extent of the prejudice and has concluded, for the reasons given above, that there was none. The works were accepted by the Respondent as being required; she was told that the works were planned and furnished with estimates; she was given an opportunity to become involved in consultation and chose not to do so; the contractors chosen had a reputation and were the cheapest; the cost of the work could not be described as unreasonable; there is no complaint about the quality of the roof work; any issues with the door can be remedied via the warranty; the minor issues with the painting of the façade were no more than would be expected for a sea front property after one year (certainly there was no expert evidence from the

Respondent's own surveyor to suggest otherwise, as she did not share his report with the Tribunal).

41. The Tribunal determined that the dispensation requested by the Applicants be permitted.

A Cresswell (Judge)

APPEAL

1. 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.

2. 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.

3. 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 time or not to allow the application for permission to appeal to proceed.

4. 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.