

10489



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

Case Reference : **CHI/21UL/LDC/2014/0045**

Property : **2 Castle Hill Avenue & 26 Bouverie Road
West, Folkestone, Kent CT20 2QT**

Applicant : **Kalala Ltd.**

Representative : **Pembroke Property Management**

Respondents : **Bouverie Investments Ltd.**

Type of Application : **Section 20ZA of the Landlord and Tenant Act
1985 (as amended)**

Tribunal Members : **Mr. R. A. Wilkey FRICS (Surveyor/Chairman)
Ms. J. Morris (Lay member)**

**Date and venue of
Hearing** : **Friday 31st October 2014
Paper determination**

Date of Decision : **Friday 31st October 2014**

DECISION

DECISION IN SUMMARY

1. The Tribunal determines to dispense with the consultation requirements contained in Sch.4 Part 2 paragraphs 8-13 of the Service Charges (Consultation Requirements) (England) Regulations 2003 and the Section 20 procedure in relation to the qualifying works to the defective rendering at the rear of the property.

INTRODUCTION

2. This is an application by the Freeholders of the block, in accordance with S.20ZA of the Landlord & Tenant Act 1985, for dispensation of all or any of the consultation requirements in respect of qualifying works.
3. Directions for the conduct of the matter were issued by the Tribunal on 6th October 2014

THE LAW

4. The statutory provisions primarily relevant to this application are to be found in S.20ZA of the Landlord & Tenant Act 1985 as amended (the Act). The Tribunal has of course had regard to the whole of the relevant sections of the Act and the appropriate regulations or statutory instruments when making its decision, but here sets out a sufficient extract or summary from each to assist the parties in reading this decision.
5. S.20 of the Act, and regulations made thereunder, provides that where there are qualifying works, the relevant contributions of tenants are limited unless the consultation requirements have been either complied with or dispensed with by the determination of a First Tier Tribunal. In the absence of any required consultation, the limit on recovery is £250 per lessee in respect of qualifying works.
6. The definitions of the various terms used within S.20 e.g. consultation reports, qualifying works etc., are set out in that Section and in S 20ZA.
7. In order for the specified consultation requirements to be necessary, the relevant costs of the qualifying works have to exceed an appropriate amount which is set by Regulation and at the date of the application is £250 per lessee.

8. Details of the consultation requirements are contained within a statutory instrument entitled Service Charges (Consultation Requirements) (England) Regulations 2003, SI2003/1987. These requirements include amongst other things a formal notice procedure, obtaining estimates and provisions whereby a lessee may make comments about the proposed work and nominate a contractor.
9. S.20ZA provides that a First Tier Tribunal may dispense with all or any of the consultation requirements if it is satisfied that it is reasonable to dispense with them. There is no specific requirement for the work to be identified as urgent or special in any way. It is simply the test of reasonableness for dispensation that has to be applied (subsection (1)).
10. As regards qualifying works, the recent High Court decision of Phillips v Francis[2012] EWHC 3650 (Ch) has interpreted the financial limit as applying to all qualifying works carried out in each service charge consultation period. However, this decision is subject to an appeal which has yet to be heard.
11. 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 Ltd. v Benson et al [2013] UKSC 14. 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.

EXTENT OF PROPOSED WORK

12. The Application states:

1. A scaffolding canopy needs to be erected to prevent decaying masonry [*sic*] from a parapet wall falling on somebody while entering the residential flats or bank bar in the basement of the restaurant. This is a temporary measure until major works commence to rebuild the parapet wall. The Section 20 consultation for these works has been completed. The Landlord is waiting for the 2 leaseholders to pay for the works. The cost of the scaffolding is estimated to be £900 plus VAT.
2. There is a roof leak into one of the flats of the upper floor leaseholds. We believe this is caused by slipped slats [*sic*] We need to erect scaffolding in order to investigate the issue and carry out the repairs. We estimate the repairs will cost an estimated £300 - £500. However the scaffolding is estimated to cost £2,000 to erect just to investigate.

DESCRIPTION AND CIRCUMSTANCES

13. The building is a substantial corner property on five floors. It is arranged as a restaurant on the ground floor with self-contained flats above.

Although there are ten self-contained flats above the commercial premises, they are demised under the terms of one lease as indicated below.

THE LEASES

14. The ground floor and basement are subject to a lease for a term of 20 years commencing 25th November 2009. The Tribunal has no jurisdiction to determine matters in respect of this part of the building.
15. The remainder of the property is let for a term of 125 years from 1st January 2003 and the tenant has the right to use this part of the building "...as a whole or in separate flats or such other user as may be permitted by the Local Planning Authority.
16. By virtue of Clause 8.2, the landlord must, amongst other things, "keep in good and substantial repair reinstate replace and renew the Building and the Conducting Media not exclusively serving the Property or the commercial premises on the ground floor and basement...

17. By virtue of Clause 7.1 the tenant covenants to pay contributions by way of service charge to the Landlord which the Landlord may from time to time expend and as may reasonably be required on account of anticipated expenditure as described in the Third Schedule...
18. The Third Schedule has the sub-title "Service Charge for the Development" and Clause 4 states "In the performance and observance of the covenants obligations and powers on the part of the Landlord contained in this Lease or with obligations relating to the Building or its occupation and imposed by operation of law..."
19. The Tribunal has not interpreted the leases to determine whether or in what proportion a service charge may be levied on the tenant.

CONSIDERATION

20. Item 4 of the Directions issued by the Tribunal on 6th October 2014 states that the Application is to be determined on the papers without a Hearing in accordance with rule 13 of the Tribunal Procedure Rules 2013 unless a party objects in writing within 28 days of the date of receipt of these Directions. No such objection had been received and thus the Tribunal retired to make its decision on the basis of a paper determination.

PRELIMINARY MATTERS

21. The Tribunal had received the following documents prior to the Hearing:
 - The Application to the Tribunal
 - A photograph showing the front of the building and indicating the proposed location of the scaffolding canopy together with the area of wall where masonry may break off
 - Directions issued by the Tribunal on 6th October 2014
 - Form completed by the Lessee of the residential upper parts which supports the Freeholder's application
 - Estimate dated 21st October 2014 from Alan Ball Roofing to provide scaffolding and replace six slates for the sum of £1,350 plus VAT
 - Estimate dated 6th August 2014 from B J Scaffolding Ltd. to supply the necessary scaffolding for the sum of £2,500 plus VAT

- Copy of the Notice of Proposals and associated schedule of works served on the Lessee as part of the Section 20 Consultation in respect of the major works to the building (as opposed to the work which is the subject of this application)
 - Copy of a lease dated 7th May 2003 in respect of the First, Second and Third floors of the building
 - Copy of a lease of the Basement and Ground Floor of the building
22. The Tribunal confirms that the Application under consideration is solely to dispense with the consultation requirements 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 landlord or any of the tenants under S.27A of the Act to deal with the liability to pay the resultant service charges. It simply removes the cap on the recoverable service charges that S.20 would otherwise have placed upon them.

THE APPLICANT'S VIEWPOINT

23. The Application states "With regards to the parapet wall, there is an immediate health and safety risk that decaying masonry could fall and injure a person. In relation to the roof leaks, we are concerned that the issue will worsen if not tended to immediately".
24. It also states "A section 20 Consultation has already been carried out in respect of major structural and external works required at the property. The Landlord is waiting for the two Leaseholders to pay for the works before instructing the contractor".

THE LEASEHOLDERS' VIEWPOINT

25. The Lessee of the residential upper parts has completed a form indicating that he supports the Application by the freeholder for dispensation. No other communication has been received.

THE DECISION

26. The decision is made on the basis of a paper determination and the Tribunal has carefully considered the documents supplied as indicated above.

27. As indicated earlier, the primary consideration for the Tribunal is whether or not the Lessee will suffer prejudice if Dispensation is granted.
28. The proposed work is ancillary to the imminent major works which have been the subject of S.20 Consultation.
29. The Respondent reported both issues to the Applicant and has indicated that he supports the proposal for dispensation.
30. The nature and basis of the proposed works has been established and, as indicated earlier, the grant of dispensation simply removes the cap on the recoverable service charges that S.20 would otherwise have placed upon them. The landlord or the tenant can make a subsequent application under S.27A of the Act to deal with the liability to pay the resultant service charges.
31. The Tribunal has carefully considered all the evidence available to it and has concluded that there is no evidence that the Respondent may be prejudiced by the lack of consultation.
32. Taking all the circumstance into account and for the reasons stated above, the Tribunal is satisfied that it is reasonable in all the circumstances for it to grant dispensation from the requirements of Section 20(1) of the Act in respect of the proposed works.
33. The circumstances relating to the leases are unusual in that the whole of the residential upper parts (which comprises ten self-contained flats) is let on one lease.
34. As part of the Application, the Freeholder states "It is an extraordinary circumstance to have only one qualifying leaseholder for such a large building. £250 doesn't go far with regards repairs. The Landlord would like to ask for a blanket dispensation on all future works up to a value determined by the Property Tribunal".
35. The Tribunal has no power or jurisdiction to vary Statute or the leases in this case.

Dated: Friday 31st October 2014

Roger A. Wilkey FRICS (Surveyor/Chairman)

Appeals

38. 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.
39. 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.
40. 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.
41. 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.
42. 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.