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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MS/LSC/2014/0044
Property	:	Wyndham Court, Commercial Road, Southampton, SO15 1GS
Applicant	:	Julie Fortescue (First Applicant) Anthony Putnam (Second Applicant)
Representative	:	
Respondent	:	Southampton City Council
Representative	:	
Type of Application	:	Application for permission to appeal
Tribunal Members	:	Judge N Jutton and Mr D Lintott FRICS
Date of Decision	:	10 February 2015

DECISION

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1 **INTRODUCTION**

2 By an application dated 29 January 2015, the Applicants apply to the Tribunal for permission to appeal the Tribunal's Decision dated 20 November 2014 to the Upper Tribunal (Lands Chamber).

3 The Applicants sought an extension of time within which to seek permission to appeal and that application was granted by the Tribunal extending the time to 29 January 2015. A further application to extend the time beyond that date was refused.

4 **Grounds of the Application for permission to appeal**

5 The Applicants break down the grounds they rely upon into three. They describe those grounds as issue 1, issue 2 and issue 3. They are as follows:

6 **Issue 1**

7 The Applicants accept that the major works carried out to the lifts at the Property which form the subject of these proceedings (the Works) fell within the scope of the qualifying long term agreement made between the Respondent and Axis Elevators Ltd (the Contract).

8 However, the Applicants say that the section 20 consultation process followed by the Respondent in relation to the Contract was misleading. They refer to a letter dated 1 May 2009 from the Respondent to the lessees at the Property (page 430 in the hearing bundle). They say the letter is misleading because it only invites comments in respect of a proposed contract for *"... service, maintenance and minor repairs"*. As such they say that the letter did not reflect the true scope of the Contract. That had it done so, then the lessees would, they contend, undoubtedly have made observations.

9 It follows, they say, that had the Contract on their case been a contract that was limited as the said letter of 1 May 2009 suggests to a contract for *"service, maintenance and minor repairs"*, then the Works would have required a separate contract which would have involved a consultation process under section 20 and which would have allowed the lessees the opportunity to submit details of alternative contractors. An opportunity that was accordingly denied to them.

10 That as a consequence, the Applicants say they suffered prejudice by reason of the failure of the Respondent to properly consult with them in respect of the Contract whose scope in fact was far greater than they had been led to believe.

11 That as such, the Applicants say the Tribunal was wrong to grant the Respondent's application for dispensation in respect of the Contract (described as the 5th issue in the Decision).

12 **Issue 2**

13 The Applicants say the Tribunal was wrong to determine that the Works were necessary and were reasonably incurred. Of the 4 lifts at the Property, they say that usage and failure rates differed widely. That as such it is reasonable to conclude that each lift would require different amounts of work/maintenance. They make the point that lift 1 was out of service for many months, lift 2 for a shorter time while lifts 3 and 4 remained in service. That notwithstanding the contracts for the work for each lift were for identical amounts and were not based upon condition reports. That as such, the works to the lifts were not, the Applicants say, based upon the actual condition of each lift and that as such the Tribunal was wrong to conclude that the Works were necessary and reasonably incurred.

14 **Issue 3**

The Applicants say the Tribunal was wrong to grant the Respondent dispensation in respect of the consultation requirements relating to the Works. That in particular, the Tribunal was wrong to determine that the Applicants had failed to establish that they had suffered relevant prejudice by reason of the Respondent's failure to consult. The Applicants say that the Respondent prevented the Applicants from obtaining an alternative quotation for the Works. That by the time the Applicants say the Respondent offered access in June 2014, it was too late for them to obtain a realistic quotation for the Works. The Applicants say the Tribunal failed to take into consideration the fact, on the Applicants' case, that the lessees were *"actively prevented"* by the Respondent from obtaining alternative quotes. That even if the Applicants had taken the opportunity from June 2014 (which the Applicants say was the first time they had the opportunity) to obtain alternative quotes, that no doubt the Respondent would have argued that the quotes were not *"realistic"* given that the Works had by that time been carried out (and parts removed from the lifts and thus not available for inspection). The Applicants refer to the Decision of the Supreme Court in the case of **Daejan Investments Ltd v Benson** (2013) UKSC 14 which they say provides that financial prejudice can be demonstrated where a lessor prohibits access to the Property and thereby prevents lessees from obtaining alternative quotations for works. The Applicants therefore say that the Tribunal was wrong to grant the Respondent dispensation in respect of the consultation requirements relating to the Works.

15 **The Tribunal's Decision**

16 In respect of all three issues, the Tribunal has considered, taking into account its duty to deal with cases fairly and justly, whether to review its Decision. For the reasons set out below, the Tribunal has decided not to review its Decision.

17 **Issue 1**

18 The Tribunal determined that the Council had failed to properly comply with the consultation requirements in respect of the Contract on the basis that the Contract was signed on 31 March 2010 notwithstanding the fact that the

consultation period did not end until 7 April 2010. That error was accepted by the Respondent.

19 The Applicants say however that they were misled. That the consultation process was further defective because in the event the Contract entered into was of a far wider scope than they had been led to believe. That as such, the Applicants say they have suffered prejudice because had they been aware of the full scope of the proposed contract, they would have been able to ask the Respondent to obtain alternative quotes from other contractors. Alternatively had the Contract been limited in scope as they had been led to believe then they would have had the opportunity to make observations in respect of the Works as those would have been the subject of a separate contract with the contractor.

20 The Applicants contended before the Tribunal that the consultation process in respect of the Contract was defective in two ways. Firstly, because the Contract was signed before the consultation process had been completed. That was not disputed by the Respondent. Secondly, because they had understood (by reason of what they had been told by the Respondent) that it was a contract for maintenance and not a contract for major works.

21 Counsel for the Respondent said that no evidence had been put before the Tribunal to the effect that had the Applicants known that the Contract was to include major repairs, that they would have made observations. That they were making those allegations with the benefit of hindsight. It was, he contended, for the Applicant leaseholders to show what they would have done differently had they been consulted. In particular, what they would have done differently to their financial advantage. As a consequence, they had failed to demonstrate that they had suffered relevant prejudice by reason of the failure to consult properly in respect of the Contract.

22 As Daejan makes clear the factual burden of identifying some relevant prejudice rests with the Applicants. That may well be regarded as a somewhat onerous burden but nonetheless not insurmountable. The Applicants say in effect that they were denied the opportunity to make observations. However, they adduced no evidence to show what would have happened had they (on their case) submitted observations and/or alternative quotes. The Respondent's case is that it had received four tenders for the Contract which were considered in the form of a matrix (page 595 of the bundle) from which it selected the lowest tender. There was no evidence adduced by the Applicants, for example that had they submitted observations that that may have resulted in ultimately the Respondent accepting a lower tender for the Contract.

23 In all the circumstances, the Tribunal is satisfied that it was open to it to have reached the decision that it did upon the basis of the evidence before it. Accordingly, the Applicants' application for permission to appeal to the Upper Tribunal (Lands Chamber) in relation to issue 1 is refused.

24 **Issue 2**

25 Were the Works necessary and reasonably incurred? The Applicants say that given the different usage of each of the 4 lifts, that they would have worn at different rates. That as a consequence, it was reasonable to conclude that the amount of work that would have been required to each lift would differ. That the Works carried out were not based upon the actual condition of the lifts and as such, the Tribunal was wrong to conclude that the Works were reasonable and necessary. That was an argument raised by Miss Fortescue before the Tribunal (paragraph 40 of the Decision). Mr Putnam said quite fairly that he was not at any time in a position to judge what works were needed to be done. As Counsel for the Respondent pointed out, Mr Putnam in his Statement referred to the lifts as beginning to *"fail irretrievably"* (paragraph 75 of the Decision). Mr Geoffrey Miller the Council's Housing Investment Manager said that it was felt prudent to carry out works to all 4 lifts because whatever the current condition of lifts 3 and 4, they would in time, given their age, have required major works.

26 The Tribunal noted that there was a history of the lifts increasingly breaking down. That it did not appear to be in dispute that there had been what Mr Miller described as a catastrophic failure of lifts 1 and 2. That the lifts at the property had not been subject to any major works for at least 42 years. Mr Putnam in his Statement said *"It was clear that the Wyndham Court lifts needed major work carried out to them ..."* and he also referred to lifts 1 and 2 irretrievably breaking down.

27 There was no evidence before the Tribunal to suggest that the works to all 4 lifts were not reasonably incurred. The Tribunal also bore in mind the fact that the Respondent would be responsible for paying for a large proportion of the cost of the Works by reason of its ownership of 83 flats at the Property. That the Respondent would be unlikely to undertake and incur the cost of such works if they were not necessary.

28 In all the circumstances, upon the basis of the evidence before it, the Tribunal is satisfied that it was open to it to have determined that the Works were necessary and were reasonably incurred. Accordingly, the Applicants' application for permission to appeal to the Upper Tribunal (Lands Chamber) in respect of issue 2 is refused.

29 **Issue 3**

30 The dispensation application in relation to the Works.

31 The Applicants say that the Tribunal was wrong to conclude that they had failed to demonstrate that they had suffered relevant prejudice by reason of the Respondent's failure to consult in respect of the Works and as such, the Tribunal was wrong to grant the Respondent's application for dispensation.

32 The Applicants say they did suffer relevant prejudice because they say they were in effect denied the opportunity by the Respondent to obtain alternative quotes for the cost of the Works. That by the time that they were granted that

opportunity, they say in June 2014, it was too late for them to do so. That any quotation obtained at that stage would have carried little weight.

33 As the Tribunal noted at paragraph 166 of its Decision, it remained open to the Applicants at any time, whether before or after the Case Management hearing in June 2014, to instruct their own expert to consider the specification for the Works, to consider the charges that were made for the Works by Axis, to inspect the lifts and to produce a report. The Applicants failed to do so. Had a report been produced after June 2014, then the Respondent may well have criticised it as the Applicants suggest as not being realistic given that it had been obtained after the Works had been carried out. That notwithstanding, as the Tribunal stated in paragraph 166 of its Decision, given the wholesale failure of the Respondent to consult or properly consult with the lessees, the Tribunal may well have viewed such a report sympathetically and the Respondent could not have complained had it done so.

34 The Applicants say by reference to Daejan that they have suffered relevant prejudice because they were prevented from obtaining an alternative quotation for the Works. However it appears to the Tribunal that they were not prevented from commissioning their own report in respect of the Works, from June 2014 onwards (even if that had merely been a consideration of the schedule of works). The factual burden of establishing relevant prejudice rested with them. They failed to adduce any evidence to support their contention that had they submitted observations and/or obtained alternative quotes, that the Works could have been carried out for a lesser sum. They failed to adduce evidence that they had suffered relevant prejudice. They may have been denied the opportunity to seek alternative quotations for the Works prior to them being carried out but they failed to show what relevant prejudice they suffered, or may have suffered, as a consequence.

35 Accordingly, the Tribunal is satisfied that it was open to it upon the basis of the evidence before it to have reached the decision that it did to grant the Respondents' application for dispensation. The Applicants' application for permission to appeal to the Upper Tribunal (Lands Chamber) in respect of issue 3 is refused.

36 **Summary of the Tribunal's decision**

37 The Applicants' application for permission to appeal in respect of all 3 issues as set out in its Application document to the Upper Tribunal (Lands Chamber) is refused.

Dated this 10th day of February 2015

Judge N Jutton

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 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.