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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LDC/2016/0007**
Property	:	**26-30 Cubitt Street, London WC1X 0LR**
Applicant	:	**Centenary Homes Limited**
Representative	:	**Judge Sykes Frixou**
Respondent	:	**Ready Class Limited and Others**
Representative	:	**WT Jones Solicitors (Flat 1 only)** **DTM Legal (various lessees)**
Type of Application	:	**Determination of the reasonableness of and liability to pay a service charge**
Tribunal Members	:	**Judge Dickie** **Mrs L. Hart**
Date and venue of Hearing	:	**16 March 2016, 10 Alfred Place, London WC1E 7LR**

DECISION

Summary of tribunal's determination

i. The tribunal grants dispensation from statutory consultation in respect of the ECR redecoration costing £5,000 on terms that the Applicant pays to the Respondent £2,500 in respect of costs in these proceedings.

ii. The application for dispensation from statutory consultation in respect of other works which forms the subject of the application is dismissed.

Introduction

1. The Applicant landlord applied to the tribunal for an order dispensing with statutory consultation in respect of certain major works. At the hearing the Applicant was represented by Mr Hackett of counsel and the Respondent was represented by Mr Goodwin of counsel.

2. The property which is the subject of this application is a modern purpose built block of 14 flats. An inspection was not necessary. The Applicant is a property development company, and the subject property is one site it had developed. At the time the major works were carried out, the Applicant retained ownership of Flats 3 and 5. The Respondents are the holders of long leases of flats within the property. In March 2012 the Applicant was placed into receivership and Allsop Residential Investment Management Limited ("ARIM") was appointed as property manager. The management of the property reverted back to the Applicant when it left receivership in July 2013.

The Law

3. Section 20ZA(1) of the Act provides:

"Where an application is made to the appropriate 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."

Preliminary Issue

4. Mr Goodwin argued as a preliminary issue that the application to the tribunal should be struck out as an abuse of process, since the Applicant's claim against one leaseholder, Mrs Juliet Shields, in proceedings before the County Court sitting in Central London, Claim Number A95YP438, was dismissed on 27 November 2015. That claim, he said, dealt with the service charge demands that formed the subject of this application.

5. Rule 9(3)(d) of the The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 permits the tribunal to strike out an application if:

"The Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; ..."

However that power is limited by Rule 9(4) which provides:

"The Tribunal may not strike out the whole or a part of the proceedings or case under paragraph (2) or paragraph (3)(b) to (e) without first giving the parties an opportunity to make representations in relation to the proposed striking out."

6. Mr Hackett, though not having had prior warning that this argument would be brought, observed that the factual matrix can vary case by case and submitted that it would be wrong to find that a res judicata had been erected. The relevant text of the decision of DJ Backhouse as to the sums in dispute is not set out in this decision, but whilst Mr Hackett acknowledged there was an argument to be had as to payability of the service charges to which the present application related, the time and place for that in his view was at a hearing of a substantive application under s.27A of the Landlord and Tenant Act 1985.

7. The tribunal declined to dismiss this application as an abuse of process. The argument was not raised before the hearing, and Mr Hackett has not had the opportunity to prepare to make representations in relation to it. The tribunal agrees with his submission that he should not have had to respond ad hoc to the point. It was not proportionate further to delay the conclusion of these proceedings to allow such representations to be made, and the tribunal cannot strike out for an abuse of process where an opportunity to make such representations has not been given.

8. Furthermore, whilst the tribunal understands there is clearly an argument to be had as to whether all of the sums that form the subject of this application are those that were claimed in Claim A95YP438, and whether those sums are payable according to the terms of the lease, only Mrs Shield was a party to those proceedings and there is no evidence that the 13 other leaseholders who are Respondents to this application were given notice of them.

The application

9. The Application described the qualifying works concerned as follows:

"Reinstatement and repair works to flats 3 and 5 following water ingress and waterproofing carried out in the period between November 2013 and February 2014."

The reasons for seeking dispensation given on the Application form were as follows:

"The works in question were urgent in nature and the Applicant was required to proceed with haste in order to prevent further damage to the property"

10. In fact, as Mr Hackett clarified at the hearing, the qualifying works and reasons for seeking dispensation were not accurately set out in the application, which should not relate to any works to Flat 5. That flat had been suffering from dampness and the Applicant commenced remedial works in September 2013 at its own expense. Mr Hackett said those costs were not charged to the service charge, and he summarised that the landlord in fact sought dispensation from statutory consultation in relation to:

(i) Works carried out by ECR Contracts Ltd. "ECR" on the common parts and render redecoration and maintenance, which were conceded as non urgent. The cost was £5,000 (invoices were produced in evidence).

(ii) Works by Cemplas Ltd. "Cemplas" to remedy the ingress of damp to Flat 3 at a cost of £5,960.

(iii) Works by ECR relating to the damp ingress at Flat 3 at a cost of £7,058.

Submissions, Tribunal's Determination and Reasons

11. On the day before the hearing the Applicant produced a witness statement from Mr Marc Rowan, director of the Applicant company since April 2004. Whilst Mr Goodwin did not object in principle to the admission of this witness's evidence, Mr Rowan had not in fact attended the hearing to give his evidence. The application has been brought very late. The reasons for the delay given by Mr Rowan in his witness statement were inadequate and Mr Hackett could not offer further explanation.

12. Mr Hackett emphasised that, according to the decision of the Supreme Court in *Daejan Investments Limited (Appellant) v Benson and others (Respondents)* [2013] UKSC 14, the burden of proof is on the Respondents to show some prejudice they would not have suffered had the consultation requirements been complied with but would suffer if an unconditional dispensation were granted. He considered that the Respondents had failed to discharge this burden by offering only a vague hypothesis that they had lost the opportunity to scrutinise the works. Mr Hackett referred the tribunal to the headnote in the judgment in *Daejan:*

"the purpose of a landlord's obligation to consult tenants in advance of qualifying works ... was to ensure that tenants were protected from paying for inappropriate works or from paying more than would be appropriate; that adherence to those requirements was not an end in itself, nor was the dispensing jurisdiction under section 20ZA(1) of the 1985 Act a punitive or exemplary exercise; that, therefore, on a landlord's application for dispensation under section 20ZA(1) the question for the leasehold valuation tribunal was the extent, if any, to

which the tenants had been prejudiced in either of those respects by the landlord's failure to comply"

and to paragraph 69 of the judgment *of Lord Neuberger:*

"it is worth remembering that the tenants' complaint will normally be, as in this case, that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, it does not appear onerous to suggest that the tenants 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. Indeed, in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the LVT, and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord."

(i) Works carried out by ECR on the common parts and render - £5,000.

13. The Applicant had produced a schedule of works dated January 2014 prepared by Mr J Crombie MCIArb of Ridett Ltd. surveyors which divided the redecoration works into two phases - external render and internal common parts. A letter dated 15 February 2016 from Mr Crombie with contemporaneous correspondence showed this schedule was sent to two other contractors apart from ECR, though these did not apparently return a tender.

14. The quotations given by ECR dated 3 February 2014 were produced. They were awarded the contract in early 2014 as they were already on site. Invoices dated 8 and 11 April 2014 were produced which Mr Hackett invited the tribunal to relate to the ECR tenders, showing the work came in under budget at a cost of £2,500 for each phase (as against a quoted cost of £3,100 and £2,900). Mr Rowan's witness statement suggested a balancing payment of £900 against a quoted cost of £5,900 had subsequently been made within the payment of £7058 to ECR, but his figure and assertion were not adequately supported by the evidence.

15. Whilst Mr Rowan in his witness statement appeared to maintain that these works were urgent, Mr Hackett sensibly had to acknowledge that they were not. There was no dispute that there had been a complete consultation failure (though leaseholders had been notified in January 2014 of the intention to obtain a schedule of works from a surveyor).

16. In spite of these circumstances, the tribunal accepts Mr Hackett's submission that the Respondents have not evidenced any way in which these works were unnecessary or might have been carried out more cheaply. They were undertaken on professional advice, were of an

unexceptional nature, and the landlord had attempted market testing. A detailed specification of works has been produced but no alternative quotations have apparently been sought by the Respondents. The tribunal cannot find sufficient evidence of any prejudice to them caused by the failure to consult, and it accordingly grants dispensation upon condition that the cost is limited to £5,000, that being the expenditure properly evidenced. The further term upon which this dispensation is granted is discussed below under "Costs".

Remedial works to damp in Flat 3 (ii) Cemplas £5,960 and (iii) ECR £7,058.

17. The Applicant's case was that the damp affecting Flat 3 had been known about for some time, but prior to January 2014 had been attributed to the wrong causes. Since mid-2012 the tenant of Flat 3 had complained to ARIM about damp problems. The initial diagnosis was a leaking planter box in the flat above, which was repaired. The dampness continued and was then diagnosed as an uncapped overflow pipe in the bath. The Applicant considered the property to have been poorly maintained by ARIM.

18. It was the Applicant's position that, after it had come out of receivership, further remedial works to Flat 3 were identified as necessary. A report by BM TRADA, a timber consultancy company, was commissioned, and concluded that the dampness was attributable to the water leak from the overflow pipe having not yet dried, or some new and unknown source. The tenant left Flat 3 in November 2013. The leak continued. In January 2014, while the landlord's contractors ECR were working on Flat 5, the floors in Flat 3 were lifted and at this point it first became apparent that the damp proof course had failed and remedial works were required.

19. Mr Hackett submitted that the evidence demonstrated that the Applicant had in fact saved the Respondents money by contracting the damp works urgently in a deteriorating situation using ECR as contractors who were already on site to do the building work associated with the damp proofing. ECR had recommended Cemplas to do the damp proofing itself.

20. The Applicant's evidence on the cost of these works was confusing.. Since Mr Rowan did not attend the hearing to submit to cross examination the tribunal is unable to place weight on his evidence where it is genuinely in contention. The Respondent did, however, draw attention to the inconsistency in his statement when he said:

"10. At paragraph 19, the Respondents state that it is unclear how much of the £12,058 is attributable to work concerning water ingress. The common parts, external and internal works were carried out at a cost of £5,000..... The remainder of the £12,058 (being £7,058) relates to works carried out by ECR associated with the water ingress. This

included preparing Flat 3 to enable Cemplas to carry out the necessary works and making good once these works had been completed. The external and internal painting works were in fact £5,900 and the invoices are on account invoices with the balance being contained within the final invoice of £7,058. Which also includes for the cost of Cemplas works and the ECR works in conjunction with these works.

21. Thus the £7,058 is said both to be for the ECR damp related works and at the same time to include a £900 balancing payment for the maintenance contract, and is said to be for ECR work but also to include the cost of Cemplas works. No specification or contract for any of the damp work was produced. The ECR invoice for £7,058 did not specify the flat to which it related (or indeed the property - the invoice was addressed to a company associated with Mr Rowan's family). Cemplas invoices for £4680 and £600 were produced in evidence. Mr Rowan's witness statement said that a payment of £680 had also been made to Cemplas, but the invoice lost. A breakdown of costs was provided by the Applicant's accountants. However, the tribunal noted that the Cemplas estimate was for £4680 including VAT plus £600 for an insurance backed guarantee. It was entirely unclear as to what the additional payment of £680 related, or when it had been made.

22. The delay in making the application to the tribunal for dispensation appears to have been a contributory factor in the gaps in the evidence. Mr Crombie's letter explained that Ridett Ltd. ceased to trade in 2014 and full documentation is not available.

23. It is notable that neither the report of Cemplas nor the letter from Mr Crombie indicated that the damp works to Flat 3 were urgent. The assertion of urgency is only made in grounds for the application and the witness statement of Mr Rowan, and the tribunal rejects it. The tribunal considers it is more likely that Mr Rowan's lack of awareness of his legal obligations as landlord was the reason for the failure to consult in respect of these major works, and the reason for the delay in bringing this application. Such shortcomings received the following criticism by DJ Backhouse in her judgment:

"7. Mr Rowan ... is unaware of any of his legal obligations under the 1985 Act

14. [Counsel for Mrs Shield] submits that there has been an egregious failure by the claimant to comply with its duties under the 1985 Act, and I entirely agree. Mr Rowan has no idea what he should be doing."

24. The tribunal on the available evidence finds that the failure to engage in any consultation at all with the leaseholders regarding the works to Flat 3 was not justified. However, the tribunal must consider the question

of prejudice arising. It is clear that the leaseholders lost the opportunity to make observations about the scope of the damp works to Flat 3, as well as to nominate contractors. Both Flats 3 and 5 were owned at the relevant time by the Applicant, and ECR were contracted to work on both of them (the Applicant paying the cost of the works on Flat 5 but seeking to charge those for Flat 3 to the service charge). Given these circumstances and the history of mismanagement of the property, the Applicant should have taken care to demonstrate objectivity in consultation and decision making in respect of the damp works. However, it did not.

25. The tribunal agrees with the Respondent's criticism of the lack of clarity in the application as to the works to which it relates and their cost, which has made it more difficult for them to respond to the application. Without the instructions or specifications in relation to which the quotations for the damp works had been prepared, it is difficult to see how the Respondents could meaningfully have challenged the works or their cost with their own evidence in these proceedings.

26. Furthermore, the Respondents argued that they had been prejudiced by the failure to consult because they did not have the opportunity to question whether the damp works ought in fact to have been covered by the buildings insurance or NHBC guarantee. The Respondents relied on Mr Rowan's witness statement all but conceding the point in part:

26. This could not have been dealt with by NHBC as it was past the latent defect liability period and was caused by poor maintenance. Involvement of NHBC would have resulted in delay and would not have provided any assistance in the matter. Further it is clear it was an insurance matter but ARIM failed to deal with it as such and it has been made abundantly clear to the Respondents that we are in the process of taking ARIM to task legally from which they will enjoy a return."

27. ARIM ceased to manage the building in the summer of 2013. Mr Goodwin submitted, and the tribunal accepts, that if statutory consultation had taken place in relation to these works the leaseholders would be likely to have made observations on the basis that the insurer (or NHBC) should be approached to consider a claim in respect of the breached damp proof course.

28. Mr Rowan's witness statement substantially strengthens the Respondents' position. His belief that the problem was caused by poor maintenance (which rather contradicts his assertion that this was clearly an insurance matter), if correct, would make an insurance payment unlikely. However, the outcome of any claim cannot now be known but it does appear on the available evidence that it would have been prudent for the Applicant to make one. If a claim had been paid, the landlord would have recovered its expenditure. If not paid because

the fault lay with ARIM, because of poor maintenance or a failure to make an earlier claim, it is hard to see why the tenants could ultimately be liable to pay service charges resulting from the cost of the landlord's agent's default. The landlord's remedy, if any, lies against ARIM.

29. It is plain in these complex circumstances that more robust evidence of the cause of the dampness, its remedy and reasonable cost should have been obtained, and that the leaseholders would have required this of the landlord if they had been consulted. The tribunal is satisfied that prejudice has been caused to the Respondents and that the circumstances are materially different to those which the tribunal has considered in relation to the common parts and rendering redecoration. The Respondents lost the opportunity to challenge the damp works, nominate contractors and obtain more competitive prices, and for the purposes of their preparation to resist this application for dispensation, they have been unable to get alternative quotations based on the evidence made available by the landlord. In all the circumstances the tribunal finds it is not reasonable to dispense with statutory consultation in respect of any of the damp works - both the ECR and Cemplas contracts, and in particular that the imposition of terms on a grant of dispensation would not be adequate to offset the prejudice caused to the Respondents.

Costs

30. The Respondent produced a statement of costs incurred in these proceedings totalling £5111,21. Payment of costs, if reasonably incurred in considering the claim, arguing whether it should be granted and, if so, on what terms, may be an appropriate condition to impose on the condition of a grant of dispensation according to the judgment in *Daejan*. It follows that where an application for dispensation is dismissed, there is no grant upon which to make a condition as to payment of costs.

31. The present application related to two separate schemes of work – to the common parts and render, and the damp works to Flat 3. Applications for dispensation in respect of each could properly have been separately made, though conveniently heard together. The Respondent's costs have not been apportioned in that way, and the tribunal considers it appropriate summarily to assess the Respondent's costs properly attributable to the dispensation ordered in respect of the common parts and render at £2,500. Payment of such costs to the Respondents is a condition of the grant of that dispensation.

Name: F. Dickie **Date:** 28 April 2016