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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LDC/2016/0087**
Property	:	**Cresta House, 125-133 Finchley Road, London, NW3 6HT ('the property')**
Applicant	:	**Cresta Properties (SW) Limited**
Representative	:	**James Andrew Residential Limited**
Respondent	:	**38 lessees of Cresta House**
Representative	:	**Wilsons Solicitors LLP**
Type of application	:	**Section 20ZA Landlord and Tenant Act 1985**
Tribunal member(s)	:	**Miss A Seifert FCIArb** **Mr D Jagger MRICS**
Date and venue of hearing	:	**5th October 2016 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**17th November 2016**

DECISION

Decisions of the tribunal

(1) The tribunal determines that no order is made under section 20ZA of the Landlord and Tenant Act 1985 ('the Act') dispensing with all or any of the consultation requirements in section 20 of the Act.

(2) The tribunal makes an order under section 20C of Act that the costs incurred by the applicant landlord in connection with the proceedings before the tribunal are not to be regarded as relevant costs to be taken into account in the determination of any service charge payable by the respondent leaseholders.

The application

1. The applicant seeks a determination pursuant to section 20ZA of the Act for the dispensation of all or any of the consultation requirements provided for by section 20 of the Act.

2. The respondent leaseholders applied for an order under section 20C of the Act.

Preliminaries

3. The application was made by Cresta Properties (SW) Ltd, the landlord. The applicant was represented by Mr Edward Buxton of James Andrew Residential Ltd.

4. In the application form dated 26th August 2016, it was stated that the property is a building comprising 38 flats and 4 commercial offices with retail shops on the ground floor. There are also car parking spaces.

5. The basis of the application, appearing from the application form, was that the applicant sought dispensation of all or any of the consultation requirements in respect of proposed works to the property.

6. It was stated that a section 20 notice of intention, had been sent to all of the lessees on 12th August 2016. A copy of the notice sent to flat 1 was provided.

7. A description of the proposed works was stated as:

"Relocation of the landlord gas meter supply and association pipe work / controls from flat 38 to the communal hallway (opposite the lift on the third floor). The works will include purging of the existing 4 inch rising gas main, building a new cupboard in the communal hallway to house the meter and purging once complete. All necessary signage

installations and relighting / commissioning of the existing appliances on the main gas run will be included in the works".

8. Directions were issued by the tribunal on 1st September 2016. It was stated in the directions that on 12th August 2016 the landlord sent all the lessees notice of intention to carry out the proposed works and that the consultation period for that part of the process ended on 14th September 2016. Mr Buxton, on behalf of the applicant, informed the tribunal that the second stage consultation process, statement of estimates, ends on 22nd October 2014.

9. The parties requested an oral hearing which took place on 5th October 2016. As previously stated, Mr Buxton represented the landlord, Ms A Greer of Counsel, represented the leaseholders.

The tribunal's Reasons for decision

10. Ms Greer questioned whether the tribunal had jurisdiction to make a dispensation order under section 20ZA of the Act on the information presented by the applicant.

11. The applicant's lease is an intermediate lease dated 21st October 2014. The applicant is the assignee of that lease. Mr Buxton said that the applicant bought its interest in the property at the end of 2014. A copy of that intermediate lease was provided. That lease was made between Countryroad Investments Limited of the first part and Carisbrooke Properties (Basingstoke) Limited of the other part. The intermediate lease related to 'premises known as Parts of the Basement, Ground and First to Ninth Floors of Cresta House, 125 to 133 (odd) Finchley Road VW3 6HY'. The lease was drafted by Eversheds LLP and the copy produced had been certified as a true copy by that firm.

12. Ms Greer submitted that it had not been shown that works were to part of the building and therefore whether the proposed works fell within the service charge provisions. The applicant landlord had to show that the gas pipe in question serves the residential block. On the evidence presented the applicant had failed to do so.

13. Mr Buxton stated in his evidence that flat 38 had previously been the caretaker's flat. This was converted about 8 or 9 years ago and sold by the then landlord on a lease.

14. Mr Buxton said that after the applicant became the landlord under the intermediate lease, it became aware that there was a gas meter in flat 38. This was not brought to the attention of his firm when they took over from the previous agents last year, but had been drawn to their attention by the leaseholder of flat 38. No copy of the lease of flat 38 was provided.

15. Mr Buxton said that flat 38 is on the third floor of the property. The Third to the ninth floors are residential. There is a plant room on the ninth floor. He said that this contains various plant, water tanks, equipment serving the water booster etc.

16. In respect of the proposed works, Mr Buxton said that the gas installation in question is within flat 38. He claimed that it is in a 'huge' double cupboard in a one bedroom flat. He said that there is no ventilation and claimed that there is a health and safety risk to other flats in the building.

17. Mr Buxton submitted that the proposed works fell within section 20 of the Act and were 'relatively urgent'. Mr Buxton claimed that there were communal gas pipes in flat 38. There were two meters in flat 38, one domestic meter and one commercial meter. He was asked what the gas pipe served. He said that the smaller meter served the flat. The larger meter was 'live' and he assumed that this went up through the ceiling voids through several floors. However, he accepted that there was no evidence in respect of what the pipe supplied. He had assumed that it supplied an installation in the plant room on the 9th floor. However, he also said that none of the installations on the 9th floor used gas. The gas board had not been contacted to inspect or investigate any risk, or to identify who was paying the bill for any gas supplied. No gas bills had been paid or received by the landlord for a supply relating to this gas meter.

18. There was no written report supporting that the landlord's claim that this was an urgent health and safety issue, what installation the gas meter / pipes served, or who had been and was paying bill. At the hearing Mr Buxton's response was that he could not be 100% certain what the gas meter / pipes served as this would involve a lot of investigation.

19. Ms Greer referred to the intermediate lease. The plan of the 9th floor of the building was the site of the plant room and the plan also showed a penthouse flat. The plan of the third floor did not show flat 38. Mr Buxton was asked to point out where flat 38 was situated on the third floor and also the proposed position of the new meter cupboard following the works. He accepted that flat 38 was not marked on the third floor plan, but thought it was on the south side of the building.

20. Ms Greer referred to the issue of whether flat 38 was part of the building for the purposes of the service charges at all. She referred to various provisions in the intermediate lease, including the definition of 'pipes'. The services provided by the applicant's landlord under the immediate lease set out in clause 13.1.1 including the obligation maintain and repair etc. various items including pipes (except insofar as parts of the same are comprised in any part of the Building which either is let or intended to be let). Under the intermediate lease, the

applicant, is obliged to carry out works of repair, maintenance and alteration including under clause 7.1.1 to keep ... 'the Residential Common Parts in good and substantial repair and condition and, when necessary, renew or replace them', and 7.1.2 'renew and replace any landlord's fixtures and conduits forming part of the Residential Common Parts which become incapable of repair or cease to operate correctly with fixtures and conduits of equivalent modern specification, quality and value as those which are replaced'.

21. Ms Greer referred to the lease of flat 32, a copy of which had been provided. Under clause 1.8 'Residential Block' means 'that part of the Building containing premises used as or ancillary to accommodation for residential purposes together being the third fourth fifth sixth seventh eighth and ninth floors of the Building with the exception of those parts which form part of the Commercial Common Parts but including that part of the basement which does not consist of (a) the Garage and (b) those parts of the basement which form part of the Commercial Common Parts'.

22. "Commercial Common Parts' means the entrance halls doors landings lifts lift well plant equipment and services service areas effuse areas internal staircases passages pipes windows (if any) within or servicing the Commercial Block but excluding any part thereof demised or intended to be demised to a lessee.

23. "Residential Common Parts' means the entrance halls doors landings lifts lift wells plant equipment and services service areas refuse areas rubbish chutes internal staircases passages pipes windows (if any) within or serving the Residential Block but excluding any part therefore demised or intended to be demised to a lessee.

24. Ms Greer submitted that it was not clear on the current information, including the absence of evidence of certainty of the location of flat 38 and the terms of the lease of that property, that the subject pipes serve the Residential Block at all, or that the proposed works fall within the service charge obligations of the other lessees. She submitted that the relocation of pipes from within a flat, which has been let for several years in the same condition, does not fall comfortably within the service charge provisions of the leases.

25. The tribunal noted that under Schedule F paragraph 1.6 of the lease of flat 32, 'Service Charge' means the amount as determined from time to time of the aggregate of the Leaseholder's Proportions of the Residential Expenditure the Shared Areas Expenditure and the Garage Expenditure'.

26. The 'Residential Expenditure' means those of the services and matters referred to in paragraph 2.5 of this Schedule which exclusively relate to or benefit the Residential Block plus that part of the Common

Expenditure which is fairly attributable to the Residential Block' (see Schedule F paragraph 1.2 and 1.3).

27. If flat 38 is part of the common parts and is not part of the Building or retained land, Ms Greer submitted that it is questionable whether this should have been the subject of the conversion works by the then landlord 9 years ago, with the profit going to the then landlord. If the conversion of the caretaker's flat took place 9 years ago and the flat was then sold by the then landlord including the gas pipe / meter, a sensible explanation is required as to why this work has become 'urgent'. Insufficient information has been provided to support the application. The burden of proof is on the applicant. It has not been shown that the pipes in question serve the Residential Block at all. In any event it was not clear in the circumstances whether relocation of these particular pipes (which we are told are serving something but what they are serving is uncertain) from within a flat (location uncertain on the evidence presented) would comfortable fall within the landlord's obligation to repair, maintain and renew. If the works do not fall within the service charge provisions then the application for dispensation from such provisions under section 20ZA is misconceived.

28. Ms Greer referred to three possible sets of circumstances where the tribunal could be asked to exercise its discretion to dispense with the requirements on the basis of section 20ZA. One of these is where the works are so urgent that there is no time to follow the section 20 procedure. She referred to the decision of the House of Lords in *Daejan Investments Ltd v Benson and Others [2013] UKSC 14* and the decision in *Camden London Borough Council v Leaseholders of 46 flats in Harben Road Estate [2015] EGLR 45*. Ms Greer stated that those instructing her had asked to see the M & E report and reports about gas safety. The landlord had responded that they could not see these as they were not relevant. Mr Buxton said that the landlord would not hold the certificate of gas safety for the flat for gas service which did not serve the flat.

29. Ms Greer submitted that even if the proposed work in principle falls within the service charge, it is the leaseholders' position that it is not reasonable to grant dispensation. This is a mixed use building with retail on the ground floor and two floors of offices. The service charge relates to the residential part only. The catalyst for the work is the request by the owner of flat 38. Even if the work in principle falls within the service charge, it is not reasonable to dispense with the consultation provisions. The second stage consultation period ends on about 24th October 2016, assuming all the tenants were served and that regard had been had to comments.

30. Mr Buxton responded by stating that he appreciated the comments by Ms Greer at the hearing and agreed with some parts of these. He submitted that these were health and safety works and it was a priority

that these be carried out. He accepted that there were no communal gas appliances and no gas appliances in the plant on the roof. On the current information available to him, he was unable to help further in respect of the position of flat 38 or what the subject gas pipes / meter in that flat served.

31. Copies of the estimates were included in the bundles. Three estimates were referred to at £11,045, £13,877.50 and £14,254. To this would be added VAT, making the lowest estimate £11,045 + £2,209 total £13,254. The work quoted for was very similar for each of the estimates, but the tribunal was not provided any report or specification on which the scope of the work was based.

32. Ms Greer submitted that the notice of intention was dated 1st August 2016. The estimate from Plumbing & Gas Solutions Limited was dated 27th July 2016 (£11,045 + VAT). The other estimates were dated 12th August 2016 and 19th September 2016. If the current owner of flat 38 wanted the pipes/ meter moved he must have made that request before 27th July 2016. The works are yet to be carried out even though the landlord claimed that they are urgent. She submitted that, if this truly had been a health and safety issue, the works would have been carried out already.

33. Having considered the evidence and submissions, the tribunal has reached the following conclusions. The burden of proof is on the applicant to show that the works fall within the service charge provisions of the leases. It is implicit in the application under section 20ZA for dispensation of the consultation provisions under section 20, that these provisions apply to a service charge and that the works in question are qualifying works. On the evidence currently presented it is unclear whether or not the proposed works fall within the service charge provisions of the leases. Despite evidence of Mr Buxton that flat 38 is located on the third floor in the residential part of the property, it is unclear precisely where flat 38 is actually located as that flat did not appear on the lease plan. It was also unclear what the gas pipe/ meter served. Although this had been raised in correspondence from the lessees, no satisfactory evidence was provided. There was no evidence of who was charged for the gas. Mr Buxton's evidence was that there are no communal gas appliances and no gas appliances in the plant on the ninth floor /roof.

34. In the circumstances the tribunal on the current information, was unable to determine whether or not the proposed works fell within the service charge provisions of the leases. In the circumstances the tribunal did not consider it appropriate to make the order under section 20ZA requested.

35. Even if the works do fall within the service charge provisions of the leases, the tribunal does not consider on the evidence provided that it is

appropriate to make an order for dispensation under section 20ZA. Ms Greer referred to various emails, including emails dated 8th September 2016, 12th September 2016, 16th September 2016 and 3rd October 2016. The applicant's representative's emails did not provide sufficiently adequate explanations to queries raised.

36. Having considered the evidence as a whole, the tribunal concluded that it has not been shown this is an appropriate case to exercise our discretion and makes no order under section 20ZA Act.

37. In respect of section 20C of the Act, having reached the above conclusion, the tribunal considers it reasonable to make an order under section 20C that the costs incurred by the applicant landlord in connection with these 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 respondent leaseholders.

Name: A Seifert

Judge of the First-tier Tribunal (Property Chamber)

Date: 17th November 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case

number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).