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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00HN/LDC/2013/0044**
Property	:	**43 Belle Vue Road, Bournemouth, Dorset, BH6 3DD**
Applicant	:	**Mrs Melanie Castagna**
Representative	:	**-**
Respondent	:	**Ms Patricia Preston and Mr Richard Mitchell**
Representative	:	**-**
Type of Application	:	**Consultation dispensation application : section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act")**
Tribunal Members:		**Judge P R Boardman (Chairman) and Mr K M Lyons FRICS**
Date and venue of Hearing	:	**11 November 2013** **Decided on the papers without a hearing**
Date of Decision	:	**11 November 2013**

DECISION

Introduction

1. This is an application for dispensation with the consultation requirements referred to in section 20 of the 1985 Act

2. The Tribunal decided the application on the papers pursuant to rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, neither party having made any objection following the Tribunal's directions in that respect dated 16 August 2013

The grounds for the application

3. The Applicant stated that she was the freeholder of the building and owned the first floor flat. Work started on her conversion of the roof space into another bedroom in the middle of June 2013. On 2 July the roofers told her that the original clay tiles they had taken off were in very bad condition and that 80% were unusable, disintegrating and powdery. They recommended that the roof should be re-tiled, as it was the original 80-year old roof and was in a state of disrepair

4. This explained why there was so much red dust in her roof space, and was consistent with the survey report dated 16 March 2011 which she had had done before she bought the flat in September 2011, and which stated :

> "There is tile dust in the roof space indicating that the tiles are beginning to break down with age. There are uneven and slipped tiles which will need repair. As far as we can see the roof will be serviceable for some time to come. However, ongoing maintenance and eventual replacement will be required. The roof may be unreliable and leak..... we have noted the following specific items which will involve significant future expenditure: roof structure and covering"

5. The Applicant consulted the Respondents, who owned the ground floor flat (43a) and explained the situation. Mrs Preston said that they knew that the roof needed replacing and was surprised that the roofers had not mentioned before. The Applicant said that she assumed that they did not know the full extent of how bad the roof was until they started taking the tiles off. She asked the Respondents to meet her with the roof and builder that lunchtime. Mr Mitchell attended and the roofer explained the situation. At the end of the meeting the Applicant asked the roofer to stop work for the time being and to give her a quote for re-tiling the whole roof. In addition, she told Mr Mitchell that she would go ahead and get some other independent quotes which she would show him

6. She obtained 3 written quotes for £6750, £10,560, and £12,000, and one verbal quote of £8800 from Home Care in Christchurch. On Friday, 5 July 2013 she posted them through the Respondents' letterbox with a covering letter explaining that it made sense to have

the roof replaced then as it would be much cheaper for them than having the work done in a couple of years time because within her building works was already the sum of £2600 towards re-tiling the roof for herself and she had obviously already had to pay for the scaffolding (approximately £1500). That would leave a balance of £4150 to be split between her and the Respondents, i.e. £2075 each. If they left the roof replacement for a couple of years the bill would be at least £4500 each

7. However, the Respondents refused to contribute anything to the new roof, although they did not say that they wanted to get their own quotations for replacing the roof

8. The Applicant was in the middle of the building works with the roof half done by that time, with the dormers needing tiling. This meant that she had to tell the roofers who were already doing the roof (Jon Kirk Roofers), and who had in fact provided the cheapest quote, to carry on and replace the roof regardless, as she was not in a position to delay all the work while a longer consultation period was given to the Respondents

The Respondents' reply

9. The Respondents stated that they opposed the application for dispensation with the consultation process

10. The Applicant had acknowledged that she had been aware from her survey that remedial works might have to be done to the roof in the future but she did not appear to have taken any action in that respect. The quoted extract from the survey report did state that the roof would be serviceable for some time to come. During the Respondents' lengthy period of occupation of the property they had not been aware of any issues with the roof, apart from the odd slipped tile which had easily been repaired

11. Despite the contents of her survey report, the Applicant had instructed builders to make alterations to the roof without considering whether any further remedial works would be required to the roof as a consequence of those works

12. The Respondents believed that any responsible contractor appointed to undertake the alterations to the first floor flat, involving alterations to the roof, should have inspected the roof and ascertained its condition before commencing work. Had that been done, there would have been time to carry out the consultation process before starting any work

13. The Applicant had made alterations to all elevations of the roof and that had greatly increased the size and complexity of the roof structure. The Applicant started the alteration works on 3 May 2013 and erected scaffolding at that time. She advised the Respondents that the work could take some 4 to 6 weeks to complete

14. On 2 July 2013 the Applicant informed them that the builder had now stated that the roof would need to be read tiled or patched. She said that she did not wish to have the roof patched as it would not look "pretty". She did not provide at that time any estimates for any remedial work. The Respondents would have been prepared to consider contributing to the cost of having the roof patched, that did not feel it necessary for the whole roof to re-replaced, especially as major parts of the roof were being altered by the Applicant in connection with the general alterations to the first floor flat. She advised them that their contribution to the cost of renewing the roof would be £1500. On 4 July 2013 she advised them that the price would be increased and that their contribution would be £2212. On 5 July 2013 they received a further letter with a revised figure of £2075. They received 3 quotations, but only one had a report referring to the condition of the roof, albeit with very limited contents, namely the report from Jon Kirk dated 14 July 2013. The estimate of John Kirk dated 4 July 2013 provided by the Applicant was in fact addressed to Brian Southgate and was headed "re Avoncliff Road", and did not appear to relate to 43 Belle Vue Road

15. The Applicant continued with the work without giving the Respondents the opportunity of reviewing the reports received or obtaining or recommending any further reports or estimates to be obtained

16. The Respondents believed that the remedial works to the roof would not have been required, at least at the present time, had the Applicant not been undertaking the major alterations to her flat, including alterations to the roof. If the roof had required replacement, the Applicant should have obtained detailed reports and estimates following receipt of her survey report at the time of the purchase or at the time when she was entering into a contract to undertake the alterations to her flat. It would not have the necessary for the whole roof to be replaced at that time had it not been for the alterations being made by the Applicant

17. If the Applicant had considered these matters at the appropriate time, there would have been adequate time for the consultation process. The Respondents therefore opposed the application for dispensation. They did not believe it would be reasonable to grant dispensation. They had not been given adequate time to consider what remedial works were required to the roof, if any, and at what cost, before the Applicant instructed her own contractors to proceed with the work

The Applicant's response

18. The Applicant stated that she was indeed aware from her survey in September 2011 that works might be necessary to maintain the roof in good repair in the future. However, the report had also stated that the roof would be serviceable for some time to come and she was not aware when starting her building work of the full extent of the disrepair of the roof. She had a large amount of roof dust in her roof space but did not appreciate its significance with her limited knowledge of roofs. It was

not until the roofer started taking the tiles off that they could see how badly they were disintegrating. She had inferred from her survey report in September 2011 that no remedial roof works were likely in the near future. In addition, not one of the 4 contractors who had quoted for the alteration works had mentioned that the roof might need replacing, and nor had the structural engineer

19. In relation to the Respondents' statement that they had not been aware of any issues with regard to the roof during their lengthy period of occupation the property, Mrs Preston had stated on 2 July 2013 that they felt that the roof needed replacing but could not understand why the building contractor had not picked up on this when first quoting for the job. She had made the statement in front of the Applicant's friend, Richard Horswill. The roof was the original 80-year-old roof. Many of the roofs in the area had had to be replaced and repaired and the Respondents could not have seen the roof space since 1988 (i.e. 25 years ago, when they converted the house into 2 flats and moved into the ground floor flat). They were therefore hardly in a position to comment on the state of the roof and how much the tiles were disintegrating

20. In relation to the Respondents' comments that any responsible contractor should have inspected the roof and ascertained its condition before starting work, the builder she had employed, Southgate Construction, had a 9.8 rating with checkatrade, and came with very good recommendations. In fact, the Respondents were obviously impressed by his work since they intended to use him, rather than an identically rated builder, for a recent water damage insurance claim, despite his quote being £1000 more expensive

21. The Applicant did not know why a more thorough examination had not been made of the roof before starting work. However, the builder told her that they could not really tell until scaffolding was erected and they had started removing the number of tiles

22. The Applicant had never asked the Respondents to contribute to the tiling of any increased roof area following her alterations works. The tiling of the new dormers was always going to be paid solely by herself at a cost of £2600, as was the cost of the scaffolding (approximately £1500)

23. In relation to the possibility of patching the roof instead of replacing it, Southgate Construction and Jon Kirk Roofers advised that it would not be cost-effective to patch the roof, as only approximately 20% of the tiles would have been reusable. She had said this to the Respondents on 2 July 2013 and it was discussed by Mr Mitchell, the Applicant, and the roofer that same day. It was nothing to do with the roof not looking "pretty". The lease provided that the tenants [sic] had to keep the roofs in good order and condition, and she would have been shirking her responsibilities as freeholder by simply patching the roof, which in the long term would not have been cost-effective. The last thing she had

wanted was to have to go to the expense of replacing the roof, particularly as the building works were costing a considerable amount of money anyway, that she was left in no doubt by the experts who had seen the roof that replacing the roof was the correct way forward. That was why she had not provided estimates for patching the roof, because the builder and roofer had advised that it would be a waste of money

24. In relation to the Respondents' suggestion that it was not necessary for the whole roof to be replaced, the experts had so advised having inspected it, whereas the Respondents had not seen the state of the roof for 25 years

25. It was not correct to suggest that the Applicants had advised the Respondents that their contribution towards renewing the roof would be £1500. The builder had originally said that the cost could be about £1500, but that he would not really know until he had a quote for the roof, which is what she had told the Respondents. There was no fixed figure of £1500, and nothing in writing in that respect. Southgate Construction then asked the roofer for a proper quote. That quote was £7025, of which her contribution was £2600, leaving £4425 to be split between herself and the Respondents, i.e. £2212 each. However, the roofer then sent her a proper quote directly, and for some reason the total figure was less, namely £6750 (less £500 already paid by the Applicant) less her contribution of £2600, leaving £4150 to split between the Applicant and the Respondents, i.e. £2075 each. She did not query that figure as it was a lower sum. Based on the evidence given about the state of the roof all the quotations were requested to replace it, and not patch it, because patching would not have been cost-effective as so many of the tiles were disintegrating

26. The Applicant did not know why Jon Kirk's quote referred to Avoncliff, although they were on the corner of Avoncliffe Road. The final invoice correctly referred to 43 Belle Vue Road

27. All roofing works were stopped on Tuesday 2 July 2013 to enable her to obtain quotes from the roofer who was doing the job, i.e. Jon Kirk Roofing, and also two other roofers, namely Complete Roofing Solutions, and Roofing & Guttering Specialists. The Respondents never offered to obtain quotes themselves. She supplied the quotes to the Respondents on the morning of Friday 5 July 2013 by posting them by hand because the Respondents were out. She then went back in the afternoon and asked if they had received the quotes, to which they replied that they had but that they were "not up for it". They said that they were not going to contribute towards the cost of a new roof. They had therefore had time to review the quotes before responding in that way and not once did they say that they wanted her to obtain more quotes or that they wanted time to obtain quotes themselves, despite being on notice that the Applicant intended to replace the roof on Tuesday 2 July 2013

28. The Applicant was therefore left with no alternative but to instruct the roofers to finish the job as the roof space was susceptible to weather conditions, as stated by Southgate Construction in their email quoting the roof "please could you look through this ASAP as we need a quick decision due to weathering"

The lease of the ground floor flat dated 1 July 1988

29. The material provisions of the lease are as follows :

> ***Clause 4***
> *The Tenants.....covenant.....that .....the Tenants will:*
> *(4) pay the.....Service Charge*
>
> ***Clause 5***
> *The Lessor.....covenants.....as follows :*
> *(5).....*
> *(a) to maintain and keep in good substantial repair and condition*
> *(i) the main structure of the Building including.....the roof*
>
> ***The Fifth Schedule***
> *The Service Charge*
> *1 in this Schedule.....*
> *(1) "Total Expenditure" means the total expenditure.....incurred by the Lessor in any Accounting Period in carrying out her obligations under clause 5(5) of this Lease.....*

Other documents before the Tribunal

30. The other documents are as follows :
    a. a survey and valuation by Geoff Palmer BSc MRICS dated 16 March 2011 addressed to the Applicant and relating to the first floor flat at the property
    b. a roof report from Jon Kirk dated 14 July 2013, stating that on the start date he had found that the tiles were very porous and very soft due to the age of the roof, being the same roof as when the property was built; the batten was very dry and had no felt; and they were losing 3 out of 5 tiles taken off, and so had no choice but to fit a new tile and felt and batten
    c. a quotation from Jon Kirk dated 4 July 2013 addressed to "Brain [sic] Southgate" and headed "Re : Avoncliff Road", stating that the price for a complete new roof, to take old tiles off with all old timber and replace with new felt and new 25x38 batten and put a new concrete tile with new ridges to match, all fixing and fitting to be supplied in cost, was £6250 plus £500 for works already done; endorsed on the top of the document in manuscript were the words "Home Care UK Christchurch – William Saunders 01202 478144 07979 337821 £8800"
    d. an undated quotation from CRS addressed to Southgate Construction for supplying materials and carrying out roofing

works at the property as specified for £8850 plus VAT

e. a quotation from Roofing & Guttering Specialists dated 4 July 2013 addressed to the Applicant for roof works as specified for £12000
f. an e-mail from Brian Southgate to the Applicant dated Tuesday 2 July 2013 setting out the following figures from Jon Kirk :

roofing work :	£6525
work to date :	£500
total :	£7025
original price for tiling :	£2600 (inc VAT on materials)
= extra costs :	£4425

and ending "please could you look through this asap as we need a quick decision due to weathering"
g. various uncaptioned photographs, indexed as "pictures taken of state of original tiles when taken off roof"
h. a letter from the Applicant to the Respondents dated 25 July 2013, setting out her case and stating that the Respondents were under an obligation to pay half the cost of the work under the lease
i. a letter from the Respondent's solicitors dated 12 August 2013, stating that documentation provided did not comply with the consultation process under section 20 of the 1985 Act, and that the maximum payable was therefore £250
j. various e-mails dated 28 and 29 August 2013, including one from the Respondents stating that Southgate Construction were their builders of choice for repairs following water damage
k. a letter from Southgate Construction Ltd dated 21 September 2013 stating that the costings of the tiling to new dormers and round velux roof lights was quoted at £2600 on the understanding that 80% of existing tiles were to be re-used; that after the erection of scaffolding a concern was raised about the condition of the tiles; that after joist and steel works were carried out and the erection of the west side dormer the roofer was instructed to start re-tiling; that at that time, being the first opportunity, it was reported to the Applicant that the existing tiles were in an inadequate state; and that the roofer then dealt directly with the Applicant to rectify the problem
l. a statement by Richard Horswill dated 28 September 2013, stating that on 2 July 2013 he had accompanied the Applicant to the Respondent's ground floor flat; that Mrs Preston commented to the effect that the roof had been in need of repair for a while and that she was amazed that the builders and roofers had not picked up on this fact before building works commenced
m. various further uncaptioned photographs, indexed as "pictures of finished new roof"
n. a document from Jon Kirk dated 4 July 2013 addressed to the Applicant and headed "Re : new roof", stating that the price for a complete new roof, to take old tiles off with all old timber and replace with new felt and new 25x38 batten and put a new concrete tile with new ridges to match, all fixing and fitting to be supplied in cost, was £6750

o. an invoice from Jon Kirk dated 4 July 2013 addressed to the Applicant and headed "Re : invoice", stating that the total owed was £6750

Legal background

31. Section 20 of the 1985 Act provides as follows :

> *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 leasehold valuation 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 in accordance with, the regulations is limited to the amount so prescribed or determined

32. The material parts of the 2003 Regulations for the purposes of this application are :

Reg. 2 (1) In these Regulations-

"relevant period", in relation to a notice, means the period of 30 days beginning with the date of the notice

Reg. 6

For the purposes of subsection (3) of section 20 the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250

Schedule 4 Part 2

Para 8

(1) The landlord shall give notice in writing of his intention to carry out qualifying works-

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall-

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) invite the making, in writing, of observations in relation to the proposed works; and

(d) specify- (i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

Para 11

(1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made

by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate-

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate-

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)-

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out-

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection.

(10) The landlord shall, by notice in writing to each tenant and the association (if any)-

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates;

(c) specify- (i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

Para 13

(1).....where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering in to the contract, by notice in writing to each tenant and the recognised teants' association (if any) :

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected

(b) where he received observations to which.....he was required to have regard, summarise the observations and set out his response to them

33. In the Supreme Court decision in **Daejan Investments Limited v Benson** [2013] UKSC 14, the landlord wished to carry out major works. There were 5 long leaseholders, who were all liable to contribute to the cost of the works through the service charge. The landlord sent a specification to the leaseholders. Following comments from the leaseholders, and the appointment of a contract administrator nominated by the leaseholders, the landlord issued a stage 1 notice of intention to carry out the works, and a few weeks later, sent a revised specification. The leaseholders commented on it, and some of their observations were incorporated. The landlord received 4 tenders, of which 2 appeared to be the most competitive, namely one from a company called Rosewood for £453980 for a 24-week contract period, and the other from a company called Mitre for £421000 for a 32-week contract period. The leaseholders were provided with a copy of the priced specification submitted by Mitre, but not that submitted by Rosewood. The contract administrator indicated a preference for instructing Mitre. The leaseholders made a number of detailed points about the proposed works, which were provisional pending sight of all the priced tenders. The landlord served stage 3 notices on the leaseholders, stating when the priced estimates could be inspected, but, before the estimates were inspected, informed the leaseholders that the proposed works had been awarded to Mitre. Despite this, there were some further communications between the leaseholders and the contract administrator about the proposed works. Some weeks later, the landlord contracted for the proposed works with Mitre, and so informed the leaseholders some 2 weeks after that. Mitre completed the works, but late, and subject to criticisms from the leaseholders

34. Four of the five leaseholders applied to the LVT, challenging the works, and challenging whether the landlord had complied with the section 20 consultation procedure. In relation to the latter, the LVT found that the landlord had failed to comply with the stage 3 requirements in 2 respects, namely that the stage 3 notices did not contain a summary of observations, and that the estimates were not available for inspection as stated in the notices, and were inspected only later

35. The landlord applied for dispensation from the section 20 consultation requirements, and, in the event that the LVT were to find that the

leaseholders had been prejudiced by the non-compliance with the section 20 consultation procedure, proposed that the sum of £50000 should be deducted from the cost of the works when calculating the service charge as a fair figure to compensate them for any prejudice

36. However, the LVT found that the failure to comply with the requirements had caused the leaseholders substantial prejudice, and refused the application to dispense with the section 20 consultation requirements

37. Both the Upper Tribunal and the Court of Appeal dismissed the landlord's appeals

38. In the Supreme Court, Lord Neuberger, delivering the majority judgment, defined the provisions of part 2 of Schedule 4 to the 2003 Regulations as "the Requirements", and held that :
    a. *.....the obligation to consult tenants in advance about proposed works goes to the issue of the appropriateness of those works, and the obligations to obtain more than one estimate and to consult about them go to both the quality and the cost of the proposed works.....* (paragraph 43)
    b. *given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements* (paragraph 44)
    c. *thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, I find it hard to see why dispensation should not be granted (at least in the absence of some very good reason) : in such a case the tenants would be in precisely the position that the legislation intended them to be – ie as if the Requirements had been complied with* (paragraph 45)
    d. *.....the Requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above. After all, the Requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid to them* (paragraph 46)
    e. *furthermore, it does not seem to be convenient or sensible to distinguish in this context.....between "a serious failing" and "a technical, minor or excusable oversight", save in relation to the prejudice it causes.....* (paragraph 47)
    f. *.....the LVT.....has power to grant dispensation on such terms as it thinks fit – provided, of course, that any such terms are appropriate in their nature and their effect* (paragraph 54)

g. *.....it is clear that a landlord may ask for a dispensation in advance. The most obvious cases would be where it was necessary to carry out some works very urgently, or where is only became apparent that it was necessary to carry out some works while contractors were already on site carrying out other work. In such cases, it would be odd if, for instance, the LVT could not dispense with the Requirements on terms which required the landlord, for instance, (i) to convene a meeting of the tenants at short notice to explain and discuss the necessary works, or (ii) to comply with stage 1 and/or stage 3, but with (for example) 5 days instead of 30 days for the tenants to reply* (paragraph 56)

h. *further, consider a case where a landlord carried out works costing, say, £1 million, and failed to comply with the Requirements to a small extent (e.g. in accidentally not having regard to an observation), and the tenants establish that the works might well have cost, at the most, £25,000 more as a result of the failure. It would seem grossly disproportionate to refuse the landlord a dispensation, but, equally, it would seem rather unfair on the tenants to grant dispensation without reducing the recoverable sum by £25,000. In some cases such a reduction could be achieved by the tenants invoking section 19(1)(b), but there is no necessary equivalence between a reduction which might have been achieved if the Requirements had been strictly adhered to and a deduction which would be granted under section 19(1)(b).....* (paragraph 57)

i. *I also consider that the LVT would have power to impose a condition as to costs - e.g. that the landlord pays the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA(1)* (paragraph 59)

j. *where a landlord has failed to comply with the Requirements, there may often be a dispute as to whether, and if so to what extent, the tenants would relevantly suffer if an unconditional dispensation was accorded. (I add the word "relevantly", because the tenants can always contended that they will suffer a disadvantage if a dispensation is accorded; however, as explained above, the only disadvantage of which they could legitimately complain is one which they would not have suffered if the Requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted.)* (Paragraph 65)

k. *as to the contention that my conclusion would place an unfair burden on tenants where the LVT is considering prejudice, it is true that, while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants. However, given that the landlord will have failed to comply with the Requirements, the landlord can scarcely complain if the LVT views the tenants' argument sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less*

(or, for instance, that some of the works would not been carried out would have been carried out a different way), if the tenants had been given a proper opportunity to make their points..... if the tenants show that, because of the landlord's non-compliance with the Requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily an LVT would be likely to accept that the tenants had suffered prejudice (paragraph 67)

l. *the LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenant, and the LVT is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so. For the same reasons, the LVT should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that the LVT should uncritically accept any suggested prejudice, however far-fetched, or that the tenants and their advisers should have carte blanche as to recovering their cost of investigating, or seeking to establish, prejudice. But, once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it. And, save where the expenditure is self evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the Requirements* (paragraph 68)

m. *apart from the fact that the LVT should be sympathetic to any points they may raise, 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 had been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works 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* (paragraph 69)

n. *[turning now to this case].....on the basis of the evidence before the LVT, it seems to me.....that it is highly questionable whether any [relevant] prejudice at all would have been suffered. The only "specific prejudice" identified by the Upper Tribunal was*

in relation to what the LVT called..... "a matter of speculation", namely that the respondents lost the opportunity of making out the case for using Rosewood to carry out the works, rather than Mitre (paragraph 77)

39. The Supreme Court's decision, by a majority of 3:2, was that :
    a. the leaseholders had not identified to the LVT any relevant prejudice which they had suffered, or might have suffered, as a result of the landlord's failure to comply with the Requirements
    b. prejudice had to be measured at the date of the breach of the Requirements
    c. the leaseholders had then been given a substantial opportunity to comment on the proposed works and had taken full advantage of that opportunity and it was hard to see what further submissions or suggestions the leaseholders could have presented if the landlord had complied fully with the Requirements
    d. there had been no evidence to support the contention that the tenants had suffered relevant prejudice worth as much as £50,000 as a result of the landlord's failure to comply with the Requirements
    e. although there was an undoubted, albeit partial, failure by the landlord to comply with stage 3 of the Requirements, the relevant prejudice to the leaseholders of granting the dispensation could not be higher than the £50,000 discount offered by the landlord; the fact that the £50,000 could fairly be said to have been plucked out of the air was irrelevant: the essential point was that it exceeded any possible relevant prejudice which, on the evidence and arguments put before it, the LVT could have concluded that the leaseholders would suffer if an unqualified dispensation were granted
    f. the LVT should therefore have decided that the landlord's application for dispensation should be granted on terms that (i) the leaseholders' aggregate liability to pay for the works be reduced by £50,000 and (ii) the landlord pay the reasonable costs of the leaseholders insofar as they reasonably tested its claim for dispensation and reasonably canvassed any relevant prejudice which they might suffer
    g. the Supreme Court accordingly allowed the appeal and granted dispensation under section 20(1)(b) on the terms indicated

Inspection

40. The Tribunal inspected the exterior of the property on 11 November 2013. Also present were the Applicant and the Respondents. The property was a detached house on the corner of Belle Vue Road and Avoncliff Road. It had 2 storeys, and 3 dormers in a pitched tiled roof,. The walls were colour-washed rendered pebbledash. The first floor flat, 43 Belle Vue Road, had an entrance fronting Belle Vue Road. The ground floor flat, 43a Belle Vue Road, had an entrance fronting Avoncliff Road

The Tribunal's decision

41. The Tribunal's findings are as follows

42. The lease allows, in principle, costs incurred by the Applicant in maintaining and keeping the roof in good substantial repair and condition to be included in the service charge, and it is common ground that the landlord has not complied with the consultation requirements referred to in section 20 of the 1985 Act. It is accordingly appropriate for the Tribunal to consider the Applicant's application for dispensation from the section 20 consultation requirements

43. This is an application for dispensation of the section 20 consultation requirements, and not an application under section 27A of the 1985 Act about the payability of service charges. The Tribunal is therefore not concerned in this application with questions such as whether it was reasonable for the Applicant to carry out the works, whether the cost of the works was reasonable, whether the proportion of that cost attributed by the Applicant to the extension works to her own flat was reasonable, or whether the standard of workmanship was reasonable

44. In accordance with the guidance in **Daejan**, the Tribunal has considered whether the Respondents have suffered any prejudice as a result of the failure by the Applicant to comply with the section 20 consultation requirements, and, in particular, the requirements to give the Respondents the opportunity to make observations about the proposed works (including the opportunity to object to the work being done at all), the opportunity to nominate alternative contractors from whom the Applicant should obtain alternative quotations, and the opportunity to consider quotations received and to make observations about them

45. In considering those questions, the Tribunal has borne in mind the guidance in the decision in **Daejan** that it is for the Respondents to identify any prejudice which they claim to have suffered as a result of the Applicant's failure to comply with the section 20 consultation requirements, and has taken into account the following assertions in the Respondents' submissions before the Tribunal, namely that :
    a. the Applicant had been aware from her purchase survey report that remedial action works might have to be done to the roof but that it would be serviceable for some time to come
    b. the Respondents had not been aware of any issues with the roof during their lengthy period of occupation of the property, apart from the odd slipped tile
    c. the Applicant should have considered whether any further remedial works would be required to the roof as a result of her proposed alterations and her contractor should have inspected the roof and ascertained its condition before starting the work, which would have given time to carry out the section 20 consultation procedure

d. the Respondents would have been prepared to consider contributing to the cost of having the roof patched but did not feel it necessary for the whole roof to be replaced, especially as major parts of the roof were being altered by the Applicant as part of her alterations works
e. the Respondents received 3 quotations, but only one with any report referring to the condition of the roof
f. the Applicant continued with the work without giving the Respondents the opportunity of reviewing the reports received or obtaining or recommending any further reports or estimates to be obtained
g. the remedial works to the roof would not have been required, at least at the present time, if the Applicant had not been undertaking the major alterations to her flat

46. The Tribunal accepts that the Respondents were given only a short consultation period, namely from 2 July 2013, when they were first informed of the proposed works, to Friday, 5 July 2013, when they were given only a short time to consider the 3 quotations copied to them that morning, and that they were certainly given nothing like the relatively lengthy periods required by the section 20 consultation requirements at each stage of the required process

47. However, the Tribunal finds that at no time have the Respondents alleged that the failure by the Applicant to comply with the section 20 consultation requirements has prevented them from taking some action which they would have otherwise taken, such as the opportunity to obtain independent advice, the opportunity to make written observations about the proposed works, the opportunity to nominate alternative contractors from whom the Applicant should obtain quotations, the opportunity to obtain their own survey report and quotations about their preferred patching option, and the opportunity to make written observations about the quotations actually received. On the contrary, the Tribunal finds that the Respondents' comments to the Applicant on 5 July 2013 and in their submissions to the Tribunal were limited to challenges about whether the roof works were necessary at all, rather than identifying any prejudice as a result of the Applicant's failure to comply with the section 20 consultation requirements. Again, the Tribunal also finds that the comments of their solicitors on 12 August 2013 are limited to stating that the documentation provided by the Applicant did not comply with the section 20 consultation requirements, rather than identifying any prejudice to the Respondents as a result

48. The Tribunal has borne in mind the comment at paragraph 46 of the decision in Daejan that *the Requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid to them*, and finds that there is no evidence that if the Applicant had complied with the section 20 consultation requirements the Respondents would have taken any other action than the action which

they did in fact take at the time, namely to challenge whether the works were necessary at all. On the other hand, the Tribunal finds that there is every likelihood that if the Applicant had complied with the section 20 consultation requirements the delay involved in that process would have resulted in an increase in at least the scaffolding costs, to which the Applicant would have required the Respondents to make a contribution through the service charge, and which accordingly would have resulted in direct financial prejudice to the Respondents

49. Having considered all the evidence and submissions before the Tribunal in the round, the Tribunal finds that it is just and reasonable in all the circumstances of this case to dispense with the section 20 consultation requirements, and that it is not appropriate in this case for that dispensation to be conditional upon any reduction in the Respondents' liability to pay the cost of the works through the service charge or upon the payment of any legal or other costs which the Respondents might have incurred in opposing this application

50. The Tribunal accordingly determines that the section 20 consultation requirements should be dispensed with unconditionally in this case

Appeals

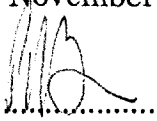
51. A person wishing to appeal against this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case

52. 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

53. 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 admit the application for permission to appeal

54. 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 which the person is seeking

Dated 11 November 2013



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Judge P R Boardman
(Chairman)