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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AN/LDC/2013/0089**
Property	:	**49 to 96 Talgarth Mansions, Talgarth Road, London W14 9DF**
Applicant	:	**Brickfield Properties Ltd.**
Representative	:	**Thomas Eggar LLP, Solicitors**
Respondents	:	**Certain Lessees of Talgarth Mansions**
Representative	:	**None notified**
Type of Application	:	**For the determination of an application under S.20ZA of the Landlord & Tenant Act 1985.**
Tribunal Members	:	**Judge Goulden** **Mr. T N Johnson FRICS**
Date and venue of Hearing	:	**Wednesday 6 November 2013 at 10 Alfred Place, London WC1E 7LR**
Appearances	:	**<u>For Applicant</u>:** **Mr P Petts of Counsel** **Miss C Chapman, Solicitor, Thomas Eggar LLP** **Mr T Chapman, Property Manager, Freshwater Group** **<u>For Respondents</u>:** **Dr L Monzon (Flat 93)** **Mr A Tchevela (Flat 95)** **Ms M D Dang (Flat 91)**
Date of Decision	:	**11 November 2013.**

DECISION

Decision of the Tribunal

(1) The Tribunal grants dispensation under S.20ZA of the Landlord & Tenant Act 1985, as amended, from all or part of the consultation requirements in respect of the works relating to the treatment of dry rot completed in January 2013 at 49-96 Talgarth Mansions, Talgarth Road, London W14 9DF ("the property").

(2) The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 so that the landlord's costs of the proceedings before the Tribunal may not be passed to the lessees through any service charge.

The application

1. The Applicant seeks dispensation from the requirements to consult leaseholders under S.20 of the Landlord & Tenant Act 1985, as amended, ("the Act"), in relation to works described in paragraph 8 below.

2. No consultation had taken place.

3. The property was described in the application as "*purpose built block of 48 flats*". The Tribunal was advised that the block was a purpose built mansion block constructed c 1900 on four storeys fronting on to a busy major road.

4. The application also stated that the qualifying works had been carried out "*between 7 January 2013 and about 24 January 2013*". The Applicant had been invoiced on 16 April 2013 in the sum of £19,850 plus VAT.

5. The application was dated 19 August 2013 and was received by the Tribunal on 21 August 2013.

6. Directions of the Tribunal were issued on 4 September 2013 which listed the case for a paper determination. The Respondents, as is their right, requested an oral hearing.

7. The lease of Flat 85 of the property was provided in the hearing bundle. With no evidence to the contrary, it is assumed that all residential leases are essentially in the same form.

8. From the documentation the Applicant seeks dispensation for the following works:-

- Treatment of dry rot affecting the structure of the block, which itself was discovered in the course of replacing a collapsed ceiling to Flat 85 and which involved the removal of several bathrooms including all plasterwork to a number of rooms in both Flats 85 (a third floor flat) and 87 (a fourth floor flat), treatment and reinstatement.

The issues

9. The only issue to be determined by the Tribunal is whether or not it should agree to the dispensation sought. The Tribunal makes no determination as to whether the costs are reasonable or that works undertaken or to be undertaken have been carried out to a reasonable standard.

10. The application stated, inter alia, *"No consultation was carried out prior to the qualifying works being undertaken,. The works were urgently required, the extent of them only became apparent after very extensive and intrusive opening up of Flats 85 and 87. The same contractor as used for the opening up works was retained and there was no time for consultation. Prior to making this application, a letter was sent to all residents explaining the situation, enclosing a full breakdown of the cost of the works, and setting out the fact that this application would be made".* A draft copy of that letter, which was undated, but was marked *"letter sent to residents on 8 July 2013"* was provided to the Tribunal.

11. The application stated that dispensation was sought, inter alia, since *"the works undertaken were urgently required and could not have been planned. They only came to light as a result of an unrelated collapsed ceiling. Very shortly after the applicant was informed by the buildings insurer that the required works would not be covered by the policy, steps were taken to instruct a contractor and to undertake works on an urgent basis. The full extent of the works was only apparent after they commenced, and it would have ultimately cost more if they had not been completed immediately following the opening up.....The content, quality and cost of the works undertaken was in no way affected by the failure to consult. A 20 year guarantee has been obtained in respect of the dry rot. There has been no material prejudice to the Respondents".*

The hearing

12. The hearing took place on Wednesday, 6 November 2013 and was attended by those persons noted on the front of the Decision. The Applicant company was represented by Mr P Petts of Counsel and Miss C Chapman, Solicitor, Thomas Eggar LLP. Mr T Chapman, Property Manager of Freshwater Group gave oral evidence on behalf of the Applicant. Of the Respondents, Dr L Monzon, Mr A Tchevela and Ms M D Dang attended. Dr Monzon gave oral evidence on behalf of the Respondents.

The Evidence:

The Applicant's case

13. A statement of grounds for the application was included in the hearing bundle. From the chronology within that bundle, it appears that the lessee of Flat 85 had reported the collapse of the ceiling in the master bedroom on 21 March 2012. Certain inspections had been carried out and photographs taken. Claim forms had been submitted to the insurers on 24 May 2012, The cause of the collapse was investigated, and found to be a leak from the corner of the flat above, Flat 87. Although remedial works were started, works stopped on 30 August 2012 when asbestos in the roof area was suspected. This did not prove to be the case following further tests but, on 5 September 2012, dry rot to the timber beams was discovered in the void between Flats 85 and 87. After further delays, the insurers confirmed, on 26 November 2012, a final decision that the cost of remedying the dry rot would not be covered by the insurance policy as such risks were excluded from the policy. Works were commenced on or about 7 January 2013 and were completed on or about 24 January 2013. A 20 year guarantee in respect of the dry rot treatment works was issued by a subcontracted specialist dry rot treatment company.

14. The Applicant maintained that the works carried out were urgent since dry rot had the potential to spread to further areas and to affect the structural integrity of the building as the beams were weak and the main beams which were affected *"could be pulled apart by hand"*. In the statement it was said *"it was not until 26 November 2012 that the loss adjuster finally confirmed that the dry rot works would not be covered by the insurance policy. The need to carry out the works within the ambit of the service charge provisions was thus only known on that date"*.

15. The Applicant accepted that it could have informally consulted the other lessees *"although it is not accepted that this would have been likely to result in any different outcome"*. Although the Applicant stated that progress of the works had been monitored *"the final cost of the works was simply not known until the works were largely done"*.

The Applicant did write to the lessees prior to lodging the application to explain the position, the need for the works and the likely financial ramifications.

16. The Applicant referred to the case of **Daejan Investments Ltd v Benson** in support of the contention that the Tribunal should consider the extent (if any) to which the tenants had been prejudiced by the Applicant's failure to consult, and dispensation should not be refused merely because the Applicant had breached or departed from the consultation requirements. The Applicant did not intend to recover costs in respect of proceedings before the Tribunal from the lessees.

17. Mr T Chapman, Property Manager, Freshwater Group was questioned by the Tribunal, in particular about the estimates, which were either undated or dated after the work had been carried out, although no witness statement had been provided by him. He confirmed that no full survey had been carried out and said *"we told them* (the contractors) *to go and fix what was needed to be done"*. Mr Chapman conceded, on questioning, that at the time the works had been carried out, he did not know work was to be carried out and had no estimates for the works. Mr Petts, Counsel for the Applicant, confirmed that the estimates had not been obtained prior to the works, but obtained for the Tribunal hearing.

The Respondents' case

18. Dr L Monzon gave evidence on behalf of the dissenting Respondents, although neither he nor any of the other Respondents had provided a witness statement. He said that the Respondents were highly critical of the actions of the managing agents. He said that the Applicant knew that they would be over the statutory threshold, and there had been ample time in which to consult the lessees.

19. The Respondents had known nothing of the works until the letter had been sent to them in July 2013, some year and a half after the problem was discovered. There had been no communication from the Applicant at all. The Respondents had been prejudiced because they had not been able to nominate a contractor. He said *"the landlord has no concern for its tenants"*. No surveyor had been approached. The managing agents had been negligent over a long period in respect of the upkeep of the building, and there had been long term neglect. There had been ample time in which to consult the lessees. Dr Monzon maintained, inter alia, that the timing of estimates was at best irregular.

The Tribunal's Decision

20. The Tribunal is critical of the actions of the Applicant.

21. On its own admission, the Applicant had not entered into any consultation in respect of works which were known to have been required at the latest by November 2012. The application to the Tribunal was not lodged until 19 August 2013. The lessees had only been advised of the works in July 2013, shortly before the application had been lodged.

22. The Applicant's evidence, as put forward by the Property Manager of its Managing Agents at the hearing, was that works had been carried out by the contractors without a full survey, without any prior estimate having been provided, without knowledge of what works were to be carried out and, presumably therefore, without any idea of what the cost would be. The Tribunal finds this difficult to believe and/or indicates a cavalier disregard for the consultation process.

23. The estimates (which were either undated or were dated long after the works had been completed) produced were for the purpose of the Tribunal hearing rather than for the purpose of any comparison.

24. The Tribunal has sympathy with the Respondents. However, under the ruling of the Supreme Court in the case of **Daejan Investments v Benson [2013] UKSC 14**, the Tribunal's focus must be on prejudice to the tenants and not the gravity of the breach. Decisions of Upper Courts are binding on the Tribunal.

25. In the circumstances of this case, the Tribunal considers that although the gravity of the breach is considerable, the prejudice alleged was the inability of the Respondents to nominate a contractor. This does not go far enough. Perhaps if the Respondents had obtained a lower estimate, albeit after the event (as the Applicant appears to have done) this may have been persuasive, but no such evidence was provided to the Tribunal. Perhaps if the Respondents had incurred costs, legal or otherwise, in establishing financial prejudice, this too could have been taken into account. Again no such evidence was provided to the Tribunal. The Tribunal can only base its Decision on the evidence before it.

26. On the basis of the paucity of persuasive evidence on behalf of the Respondents that they have suffered financial prejudice, the Tribunal grants dispensation of all or any of the consultation requirements under S.20ZA of the Act in respect of the works as set out in the application.

Name: J Goulden **Date:** 11 November 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(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) the appropriate 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.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).