9843

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**CHI/00ML/LDC/2013/0043**
Property	**53 Brunswick Place** **Hove** **East Sussex** **BN3 1NE**
Applicant	**Falcon Heath Limited**
Appearance for the Applicant	**Ms A. Gourlay barrister**
Respondents	**The leaseholders of the Property**
Appearances for the Respondents	**Mr D. Duke-Cohen solicitor** **& Ms R. Bunbury (Leaseholder)**
Type of Application	**S20ZA of the Landlord and Tenant Act 1985 as amended ("the Act")**
Tribunal Members	**Judge R.T.A. Wilson (Chair)** **Mr P.D Turner-Powell FRICS (Surveyor Member)** **Ms J.K.Morris (Lay Member)**
Date and Venue of Hearing	**27th January & 10th February 2014** **Holiday Inn Brighton & Chichester**
Date of Decision	**12th February 2014**

DECISION

Background Procedural Matters

1. The Tribunal had before it an application made by the Applicant freeholder pursuant to S.20ZA of the Landlord and Tenant Act 1985 (as amended) ("the Act") seeking an order granting retrospective dispensation from all of the consultation requirements in relation to external redecoration and repair works carried out to the rear elevations to the Property in late 2012 (the Works). The costs of the Works came to approximately £19,000.

2. By an order dated the 13th August 2013 the Tribunal gave directions for the application to proceed by way of a hearing. The directions provided that if any of the Respondents wished to contest the application they were to write to the Applicant and the Tribunal setting out their reasons for objecting to an order being made and identifying any prejudice suffered by the way that the consultation process was handled by the Applicant. They were further directed to attend the hearing.

3. The Applicant had prepared a hearing bundle, which included the evidence and documentation relied upon by both parties. The Applicant had filed a statement of case and reply and relied upon two witness statements, one from Mr Brotherton a director of the Applicant and the second from Mr Wheeler from the former managing agents. The Respondents had also filed a number of statements.

Inspection

4. The Tribunal inspected the Property immediately before the Hearing in the presence of the parties and their representatives.

5. The Property is a substantial mid terrace building originally constructed in the early Victorian times as a single residential house and now converted into 9 self contained residential flats arranged over five floors including the basement.

The Law

6. By section 20 of the Act and regulations made thereunder (the Regulations) where there are qualifying works or the lessor enters into a qualifying long term agreement, there are limits on the amount recoverable from each lessee by way of service charge unless the consultation requirements have been either complied with, or dispensed with by the Tribunal. In the absence of any required consultation, the limit on recovery is £250.00 per lessee in respect of qualifying works, and £100.00 per lessee in each accounting period in respect of long term agreements.

7. As regards qualifying works, the recent High Court decision of *Phillips v Francis* [2012] EWHC 3650 (Ch) has interpreted the financial limit as applying

not to each set of works, as had been the previous practice, but as applying to all qualifying works carried out in each service charge contribution period. This decision is currently subject to an appeal which has yet to be heard.

8. A lessor may ask a Tribunal for a determination to dispense with all or any of the consultation requirements and the Tribunal may make the determination if it satisfied that it is reasonable to dispense with the requirements (section 20ZA). The Supreme Court has recently given guidance on how the Tribunal should approach the exercise of this discretion: *Daejan Investments Limited v Benson et al* [2013] UKSC 14. (Daejan) The Tribunal should focus on the extent, if any, to which the lessee has been prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the lessor to comply with the regulations. No distinction should be drawn between serious or minor failings save in relation to the prejudice caused. Dispensation may be granted on terms. Lessees must show a credible case on prejudice, and what they would have said if the consultation requirements had been met, but their arguments will be viewed sympathetically, and once a credible case for prejudice is shown, it will be for the lessor to rebut it.

The Hearing

The Applicant's case.

9. At the commencement of the hearing counsel for the Applicant handed up to the Tribunal written submissions, which included a précis of the factual background from the perspective of the Applicant. In June 2012, following repossession of the top floor flat, the Applicant resolved to carry out the Works. A notice of intention dated the 20th June 2012 was sent to each Respondent. The notice stated that the Applicant intended to apply to three contractors for an estimate. These contractors were named as EDE Building Contractors Limited, Smart Construction Sussex Limited and United Builders (UK) Limited. The notice invited the Respondents to nominate their own contractors. No nominations were received. Thereafter a statement of estimates dated the 25th July 2012 was sent to each Respondent. This statement gave details of the prices obtained from the three contractors. The statement recorded that the Applicant had not received any written observations in relation to the Works during the initial consultation period. At the same time the Applicant had sent to each Respondent a notice accompanying the statement of estimates. The notice invited the Respondents to make written observations on the estimates by the closing date 25th August 2012. On the 3rd August 2012 the lessee of flat 2 nominated, out of time, two contractors. Even though the nominations were out of time, it was said that the agents had then tried to contact both these contractors to no avail. Towards the end of August 2012 two other lessees contacted the Agents stating that they would like to obtain their own quotes. At the beginning of September 2012 Mr Brotherton the managing director of the Applicant instructed the Agents to apply to Grayland Construction to tender for the Works. It was accepted that the owner of Grayland was a personal friend of Mr Brotherton and had in the

past carried out work on a number of the properties owned by the Applicant. In the event Grayland had submitted a tender, which was approximately £1,800 cheaper than the lowest estimate and for these reasons they were awarded the contract. It was accepted that no consultation was carried out in respect of the Grayland tender.

10. It was also accepted that the Works were qualifying works to which the consultation requirements applied and that the Applicant did not give any of the Respondents the opportunity to make comments on the Grayland estimate prior to awarding the contract to Grayland.

11. Mr Wheeler from the former managing agents was called to give evidence. His evidence included a description of the steps taken by the Applicant to comply with the consultation requirements. He described the work undertaken by his firm to draft and post the notices of intention and thereafter the drafting and the serving of the statement of estimates and paragraph B statement. Under prolonged cross-examination he remained steadfast that with the exception of the Grayland tender, his firm had correctly carried out the consultation procedure and that all the letters sent to the Respondents were accompanied by the correct notices. Copies of all the relevant consultation documentation were included in his witness statement. He also recounted the steps taken by him to obtain estimates from the contractors nominated by the Respondents. He was adamant that despite a number of calls he was unable to reach the Respondents contractors. He pointed to copies of contemporaneous telephone attendance notes, which supported his position.

12. Mr Brotherton the managing director of the Applicant was also called to give evidence. Under cross-examination he accepted that following the conclusion of statutory consultation in respect of the three contractors approached by the Applicant, he instructed the agents to obtain a further estimate from Grayland Construction for the Works. Grayland Construction was owned and operated by a friend of his who he had used for building work over many years. Mr Brotherton's evidence was that he had instructed the agents to approach Grayland because he felt that the estimates obtained from the other three contractors were all too high. He accepted that the Grayland estimate was not made available to the Respondents in accordance with the consultation regulations and that this failure amounted to a breach of the Regulations. However he maintained that he instructed the agent to accept the Grayland estimate because it would save the tenants money.

13. The Applicant's case can be very simply put in the following way. Whilst it was accepted that there had been a failure to consult over the Grayland tender, none of the Respondents had been able to demonstrate prejudice suffered as a result of this failure and therefore the clear and persuasive guidance, flowing from Daejan, was that the Tribunal was in a position to grant dispensation from all of the consultation requirements. Grayland had provided the lowest estimate and there was no suggestion that the Respondents were being asked to pay for inappropriate works, or being asked to pay more as a result of the failure to consult. None of the objections put forward by the Respondents

were relevant to how the Tribunal should exercise its discretion in the light of Daejan.

The Respondents' case

15 The Respondent's written case was not easy to understand or summarise as it was set out in a number of unconnected statements, made by each Respondent on a piece meal basis. These statements span over twenty pages and cover a multitude of grievances, for example alleged failure to repair, historic neglect, breaches of health and safety regulations, attempts to avoid payment, breaches of implied obligations to repair and wrongly inviting a friend to tender for the work. The greater part of each statement relates to matters outside of the jurisdiction of the Tribunal and is not in any way relevant to this application. No attempt had been made to marshal the issues or to structure their legal submissions in the context of the applicable law and in particular by reference to Daejan. Against this confusing background, so far as can be ascertained, the opposition to the application was based on the following grounds:

- Insufficient work was carried out
- Notices of intention and a statement of estimates were not supplied to each lessee
- A failure to invite the lessees nominated contractors to tender for the work
- A failure to disclose that the Applicant owned the top floor flat
- A failure to recognise and disclose historical damp
- Nomination of a long-term friend.

16 The oral evidence adduced by the Respondents was also equally difficult to understand. As far as could be understood, some of the Respondents maintained that they had never received the notice of intention as it had been omitted from the covering letter. Other lessees claimed that they did receive the notice of intention but not until November 2012. Two lessees claimed that they had received no consultation documentation whatsoever.

17. Ms Bunbury's primary submission on behalf of all the Respondents was that the Respondents were deprived of the opportunity to nominate a contractor, and that there had been a deliberate failure on the part of the Applicant to engage with the contractors preferred by the Respondents. Nominations had been made but the agents had failed to make contact with the contractors and therefore they were not in a position to provide a tender.

18. She also claimed that in the event, Mr Brotherton simply awarded the contract to a friend of his and that it was never his intention to allow an independent contractor to carry out the Works. The evidence of Ms Bunbury strayed into what was clearly a long-standing and bitter dispute between the lessees and the Applicant over the style and quality of management, damp and other issues relating to the building. The substance of these issues is not recorded, as it bears no relevance to this application and the issues to be decided by the Tribunal.

Consideration

19. The only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. **This application does not concern the issue of whether any service charge costs will be reasonable or payable.**

20. In large measure, the facts and chronological sequence of events leading up to Grayland being awarded the contract for the Works are not in dispute but there is an issue of fact over whether the consultation exercise was correctly completed. The Applicant relies upon the evidence of Mr Wheeler to support its contention, that apart from the Grayland tender, the consultation was compliant. Mr Wheeler's evidence was that his firm correctly carried out the consultation exercise and that all the Respondents were sent a notice of intention, a statement of estimates and also a Paragraph b statement as prescribed by the Regulations. The hearing bundle contains copies of all the requisite notices and statements and the Tribunal finds no fault with the format of any of this material.

21. The Respondents contend that the consultation exercise was flawed in that in some cases notices of intention were omitted from their letters and in other cases there was a complete failure to send any of the required documentation at all. However, none of the Respondents adduced any contempory evidence to support their position and none of them demonstrated any understanding of what statutory consultation actually entailed. They also seemed to have only a very vague recollection of what letters and documents they had received from the agents during the relevant period. Their evidence was confusing and in part contradictory. For example initially Ms Bunbury alleged that none of the Respondents had received a notice of intention in June 2012. That is to say that whilst the Respondents received letters purporting to include the notices of intention, the letters did not include the notice. Under cross-examination this position changed and she accepted that some of the Respondents had received the notice of intention in June 2012 whilst others had only received a notice of intention in November 2012. Under further cross examination it became clear that although at one point Ms Bunbury held instructions to represent all of the Respondents in their opposition to this application, she had an incomplete understanding of the law relating to consultation and just like the other Respondents she had no real understanding of what statutory consultation involved in practice. This was in stark contrast to the Applicant's agent Mr Wheeler who demonstrated a professional understanding of what was required.

22. On this issue we prefer the evidence of Mr Wheeler for two reasons. Firstly he supported his evidence with contemporaneous records whereas the Respondents did not and secondly unlike the Respondents he displayed a full understanding of the Regulations. The contemporaneous evidence included dated copies of all letters sent together with their enclosures and post-it stickers recording the attempts made to contact the Respondents' contractors. There are also letters in the hearing bundle from the Agents to the

Respondents' contractors enclosing the tender documentation. The Tribunal finds that the Respondents nominations were all out of time and therefore there was no necessity for Mr Wheeler to engage with any of the lessees nominated contractors in any event. Be that as it may the tender documentation was evidently not returned to him. We conclude on the balance of probabilities that there was not the wholesale failure to serve the Respondents with the correct documentation in respect of the initial contractors. More likely the case was that the Respondents did not appreciate or notice that what was sent to them by the Agents in June to August 2012 were the consultation documents which included time critical dates for action.

23. What is not in dispute however is that the Works do constitute "qualifying works" within the meaning of the Act to which the consultation requirements apply. It is also not in dispute that the Applicant failed to carry out any consultation over the Grayland tender and it was Grayland that were ultimately awarded the contract to carry out the Works. In the judgment of the Tribunal this failure amounted to a clear breach of the Regulations with the consequence that if the Applicant is to recover more than £250 per lessee for the Works then it must succeed in this application for dispensation.

24. The approach to be taken by the Tribunal in exercising its discretion on this application is that laid down in Daejan. In Daejan it was held that the sole question for the Tribunal to consider, when exercising its discretion in an application for dispensation, is the prejudice to the tenants flowing from the landlord's breach of the consultation requirements and that the factual burden of identifying prejudice is on the tenants.

25. The Tribunal has considered the evidence of each Respondent most carefully and has concluded that the Respondents have not individually or collectively discharged the burden of identifying prejudice. In the judgment of the Tribunal there is no cogent evidence that the Respondents are being asked to pay for inappropriate work, or more work than was actually done, or are being charged inappropriate amounts. Any prejudice would therefore seem to be entirely speculative. The Respondents have not presented any evidence from a surveyor for example, that the Works could have been completed more cheaply and nor have they presented any evidence that Grayland failed to execute the Works in accordance with the same specification as was sent to the three other contractors who priced the Works. Indeed the Grayland price was some £1,800 cheaper than the cheapest figure obtained during the consultation exercise.

26. Finally, at the hearing, the Respondents were given the opportunity to tell the Tribunal what they might have said had compliant consultation taken place and none of them were able to say. It appeared to the Tribunal that no consideration had been given to this question.

27. Because the Respondents have not been able to establish any case of prejudice, the Tribunal is satisfied that it is reasonable for it to grant dispensation from

all the consultation requirements of S.20 (1) of the Act in respect of the Works and it so determines.

28. Daejan has also clarified that the Tribunal is able to grant dispensation on such terms as it thinks fit. This includes the power to award costs. The Tribunal has carefully considered the issue of costs and has concluded that in this case it was reasonable for the Respondents to incur professional fees in investigating and challenging the application. This is the case even though their challenge was ultimately unsuccessful. There was a complete failure to carry out any consultation in respect of the Grayland tender, and bearing in mind that there had been consultation in respect of the other three contractors, this failure was, more likely than not, deliberate. Statutory rights afforded to lessees should not be taken away lightly and in this case the Respondents should not be out of pocket in respect of reasonable and proportionate legal costs incurred by them.

29. For these reasons, dispensation is given on the condition that the Applicant pays its own costs and the Respondents reasonable costs (if any) incurred in investigating and challenging this application.

30. The Tribunal makes it clear that this dispensation relates solely to the requirement that would otherwise exist to carry out the procedures in accordance with S.20 of the Act. It does not prevent an application being made by the Respondents under S.27A of the Act to deal with the resultant service charges. It simply removes the cap on the recoverable service charges that S.20 would otherwise have placed upon them.

Signed_____
Judge RTA Wilson

Dated 12th February 2014

Appeals

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) 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.

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.

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 the time limit, or not to allow the application for permission to appeal to proceed.

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 the party making the application is seeking.

If the First-tier Tribunal refuses permission to appeal, in accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007, and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the Applicant/Respondent may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.