10123

**FIRST - TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **CHI/21UC/LDC/2014/0019** |
| **Property** | **Carlton House**<br>**4 Devonshire Place**<br>**Eastbourne**<br>**East Sussex**<br>**BN21 4AD** |
| **Applicants** | **Mr TJ Buckland**<br>**Ms R Allen**<br>**Mr W Massey &**<br>**Mrs J Pride** |
| **Respondents** | **Mr TJ Buckland**<br>**Ms R Allen**<br>**Mr W Massey**<br>**Mrs J Pride**<br>**Miss S Lyons** |
| **Type of Application** | **S20ZA of the Landlord and Tenant Act 1985 as amended ("the Act")** |
| **Tribunal Members** | **Judge R.T.A. Wilson (Chair)**<br>**Mr Roger Wilkey FRICS (Surveyor Member)** |
| **Date of Decision** | **16th July 2014** |

**DECISION**

## Procedural Matters

1. The Tribunal had before it an application made by Mr Buckland on behalf of the Applicants as freeholders pursuant to S.20ZA of the Landlord and Tenant Act 1985 (as amended) ("the Act") seeking an order granting dispensation from all of the consultation requirements in relation to proposed works to be carried out to the roof (the Works).

2. By an order dated the 16th May 2014 the Tribunal gave directions for the application to proceed on the paper track without a hearing, unless any party objected. The directions provided that if any of the Respondents wished to contest the application in their capacity as leaseholders they were to write to the Applicants and the Tribunal setting out their reasons for objecting to an order being made.

3. Mrs Pride the leaseholder of Flat 2 had written a letter to the Tribunal giving her unequivocal support to the application and Ms S Lyons the leaseholder of Flat 3 had also indicated her support. Neither Ms Allen nor Mr Massey had responded to the application. At the inspection Mr Buckland the leaseholder of the top flat, Flat 4, confirmed that he also supported the application.

4. As none of the Respondents had requested a hearing the application was determined on the papers with no hearing.

## Inspection

5. The Tribunal carried out an external inspection of the building on the morning of its determination and also inspected the interior of the top floor flat in the presence of Mr Buckland.

6. The Property is a substantial detached four-storey town house believed to have been constructed in the Victorian era as a single residential house and subsequently converted into self-contained flats one on each floor. The property is of brick and rendered construction. The Tribunal inspected the interior of the top flat and was shown damp staining to the ceilings in the bedroom, bathroom and living room.

## The Law

7. 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.

8. 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.

9. 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 is 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 Applicants' case.**

10. The Tribunal had before it a bundle of papers, which appeared to have been collated by the managing agents Stiles Harold Williams LLP. The papers included the application to the Tribunal signed by the managing agents together with a folder of supplemental documents including:

    a) Statement setting out the grounds of the application
    b) Schedule of the proposed work
    c) Copies of the consultation documentation and responses in respect of the suggested comprehensive program of external work
    d) Specification of the proposed full external repairs and redecorations
    e) Tender analysis documents
    f) Relevant correspondence
    g) Asbestos report.

11. The statement sets out the factual position with regard to the Property and contains a chronology of events from 2011 to the current time. Whilst it appears common ground amongst all the parties that a program of external works of some sort is required, there is not agreement over the extent of work that is necessary. In particular it seems that the freeholders do not all agree that the full specification of work, which has already been the subject of statutory consultation and extensive tender analysis, is the way forward.

12. Against this background the leaseholders of the top floor flat assert that there are serious roof leaks affecting their flat, which require urgent attention to prevent further damage. They wish the freeholders to instruct builders to carry

out repairs limited to certain sections of the roof immediately, whilst the parties attempt to agree a way forward in regard to the other areas of disrepair. They argue that if dispensation is not given this work will be delayed, as the statutory consultation procedure will take at least three months to complete.

## Consideration

13. 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.**

14. The Tribunal first considered the terms of the specimen lease contained in the hearing bundle and in particular the repairing covenants in so far as they relate to the repair of the roof and the structure of the building. The lease places an obligation on the Applicants to repair and if necessary to replace the roof and structure of the building and the Respondents, in their capacity as leaseholders, are obliged to contribute towards the cost by virtue of the service charge provisions of the lease.

15. The Tribunal is thus satisfied that the roof repair works do constitute "qualifying works" within the meaning of the Act. As an application has been made to the Tribunal, it is assumed that the contribution required from each Respondent pursuant to the service charge provisions in their leases is anticipated to exceed the threshold of £250, and accordingly there is an obligation on the Applicants under Regulation 6 to consult in accordance with the procedures set out in the Regulations.

16. The evidence put before the Tribunal suggests that the primary reason for the application is that the freeholders have not been able to agree on a comprehensive program of the external works to be carried out to the property to address all the disrepair that exists. In these circumstances it is proposed that localised roof repairs should be carried out to address water penetration to the top floor flat. It is further proposed that there should be no formal consultation in relation to these works so application is made to the Tribunal to exercise its discretion to dispense with the requirement to consult.

17. 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 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 failure to consult and that the factual burden of identifying prejudice is on the tenants.

18. The Tribunal has carefully considered the evidence available to it and has reached the conclusion that it is not reasonable for consultation to be dispensed with in relation to the proposed roof repairs because failure to consult is likely to lead to the leaseholders suffering prejudice.

19. In the first place, there is no compelling evidence before the Tribunal that there is any real urgency in the roof works being carried out. Whilst the leaseholder of Flat 4 asserts that the water penetration is extensive, the Tribunal at its inspection noted no extensive water penetration; it did note some water stains but these did not appear severe. Water stains were noted to the corner of ceilings in three rooms of the top flat but no water was dripping and the stains appeared to have been there for some time. There was no apparent deterioration to adjacent wall or ceiling plaster. The papers do not contain probative evidence, for example a report from a building or structural surveyor, concluding that there is any real urgency in this work being carried out, or convincing argument as to why the work should be carried out in priority and independently to other work to the building.

20. Secondly, the Tribunal is not satisfied that the freeholders have a clear idea of what the cause of the damp staining is and therefore the extent of work necessary to effectively address all of the damp issues is not known. The schedule of proposed work is couched in somewhat general terms, which means that the parties are in the "dark" as to what work is required and the eventual cost. No costings have been obtained let alone a cost analysis of the financial impact of the proposed phasing. This is not a desirable state of affairs when set against the lack of agreement over what other works are necessary.

21. In the judgment of the Tribunal the decision to phase the necessary works will inevitably lead to increased costs as both phases will require scaffolding and other fixed cost preliminaries. There will therefore be a duplication of costs potentially leading to the leaseholders being charged inappropriate amounts of service charge.

22. The Tribunal accepts that some work is necessary to address the roof leaks but there is also other work to be done. If the freeholders cannot agree on a full schedule of works they could try and reach agreement on a lesser program of works (to include the roof works) and then carry out consultation in respect of that lesser specification. In this way all leaseholders will have an opportunity to make formal observations and, if they so wish, to nominate their preferred contractor to carry out these works. These important leaseholder rights, which are contained in the consultation process, should not be taken away lightly, especially in this case where the application is not shown to be universally supported by all service charge payers and there are already concerns over service charge costs.

23. Accordingly because of the potential for the leaseholders to be prejudiced if consultation does not take place, the application is refused.

Signed_____

Judge RTA Wilson

Dated: 16th July 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.