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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00BE/LDC/2014/0163
Property	:	High Tree Mansions, 28 Crescent Wood Road, London, SE26 6RU
Applicant	:	Tapestart Limited
Representative	:	Mr Justin Bates (Counsel)
Respondents	:	The long leaseholders of High Trees Mansions
Representative	:	Mr Xen Xenophontes (Flat 13) and Mr Jay Beeharry (Flat 21) appeared in person
Type of Application	:	Dispensation with Consultation Requirements
Tribunal Members	:	Judge Robert Latham Mr Chris Gowman MCIEH Mr Clifford Piarroux
Date and venue of Hearing	:	25 February 2015 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	2 April 2015

DECISION

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(1) The Tribunal is satisfied that the additional works fall within the scope of the works for which dispensation was granted by the Tribunal on 13 March 2014 so that further dispensation is not required by section 20 of the Landlord and Tenant Act 1985.

(2) Had dispensation been required, the Tribunal would have allowed the application.

(3) The Applicant concedes it does not require dispensation with regard to the additional management fees of £24,000. The Tribunal confirms that this concession was correctly made.

(4) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that only 40% of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

Introduction

1. By an application dated 11 December 2014, the Applicant seeks dispensation with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 ("the Act"). The application involves some 21 leaseholders ("the tenants") at High Tree Mansions, 28 Crescent Wood Road, London, SE26 6RU ("the property").

2. On 17 December 2014, the Tribunal issued Directions. The Tribunal noted that the landlord was seeking dispensation in respect of two matters:

(i) additional costs relating to the major works in the sum of £49,710.60; and

(ii) additional management fees of £24,000.

Given the past litigation involving this property, the Tribunal directed that there should be an oral hearing.

3. Pursuant to the Directions, the Applicant notified all the lessees of the application and the Directions which had been made. One tenant opposed the application. Mr Gough (Flat 19) raises three points. First, he contends that the additional works have only been required because of the delays of the landlord in implementing the original package of works. Secondly, he contends that the landlord agreed that it would not charge a management fee. Thirdly, he suggests that it would be wrong for the landlord to recover further legal fees through the service charge account. He suggests that these are project management issues. On 24 February 2015, Mr Gough notified the Tribunal that he was unable to attend the hearing due to work commitments which required him to travel abroad. He was content for the matter to proceed in his absence and made additional written representations.

The Hearing

4. Mr Justin Bates, Counsel, appeared on behalf of the Applicant landlord. He adduced evidence from Mr Martin Hastings and Ms Jean Jones, Mr Hastings is a surveyor employed by Jarvis Blake and Glenwright. Ms Jones is a Senior Property Manager employed by Compton Management Limited (""CPM") who is engaged by the landlord to manage the block.

5. Two tenants attended the hearing, namely Mr Xen Xenophontes (Flat 13) and Ms Jay Beeharry (Flat 21). Neither tenant had sent the landlord a statement opposing the application as required by the Directions. Mr Bates was content for them to be involved in the hearing. They were concerned about the cost of the works which had escalated and the failure of their landlord to identify the extent of the required works at an earlier stage.

The Law

6. The Consultation procedures required by Section 20 of the Act are complex. If they are to be followed, they will delay works by significantly more that the 60 days required by Stages 1 and 3. In the current case, they are to be found in the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003 No.1987) ("the Regulations"). The relevant provisions are set out in Part 2 of Schedule 4 ("Consultation Requirements for Qualifying Works for which Public Notice is not Required").

7. These requirements have been helpfully summarised by Lord Neuberger in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 at [12]:

Stage 1: Notice of intention to do the works
Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.

Stage 2: Estimates
The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

Stage 3: Notices about estimates
The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and

by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.

Stage 4: Notification of reasons
Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

8. Section 20ZA(1) of the Act provides:

> "Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

9. In *Daejan*, the Supreme Court gave clear guidance on how the consultation provisions should be applied:

(i) the purpose of a landlord's obligation to consult tenants in advance of qualifying works is to ensure that tenants are protected from paying for inappropriate works or from paying more than would be appropriate;

(ii) adherence to those requirements was not an end in itself, nor are the dispensing jurisdiction under section 20ZA(1) a punitive or exemplary exercise;

(iii) on a landlord's application for dispensation, the question for the tribunal is the extent, if any, to which any tenant might be/has been prejudiced by the landlord's failure to comply;

(iv) neither the gravity of the landlord's failure to comply nor the degree of its culpability nor its nature nor the financial consequences for the landlord of failure to obtain dispensation is a relevant consideration;

(v) the tribunal can grant a dispensation on such terms as it thinks fit, provided that they are appropriate in their nature and effect, including terms as to costs;

(vi) the factual burden lies on the tenant to identify any prejudice which he claimed he would not have suffered had the consultation requirements been fully complied with but would suffer if an unconditional dispensation were granted;

(vii) once a credible case for prejudice has been shown the tribunal must look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce

the amount claimed as service charges to compensate the tenants fully for that prejudice;

(viii) where the extent, quality and cost of the works are unaffected by the landlord's failure to comply with the consultation requirements an unconditional dispensation should normally be granted.

10. In *Francis v Phillips* [2014] EWCA Civ 1395; [2015] HLR 3, the Court of Appeal considered the vexed question of whether works constitute a single set of works for the purposes of Section 20 or the Act, or separate sets in respect of each of which the landlord must embark upon a separate consultation arrangement. The Court decided that what constituted a set of qualifying works was a question of fact and degree to be determined objectively in a common sense way taking into account many relevant factors, including where the items of work were to be carried out, whether they were the subject of the same contract, whether they were to be done at more or less the same time or at different times and whether the items of work were different in character from or had no connection with each other. The Court noted that the real protection afforded by the Act was the requirement in section 19(1) that all service charges had to be reasonable and reasonably incurred.

11. In *Marionette Ltd v Visible Information Packaged Systems Ltd* [2002] EWHC 2546 (Ch), the High Court held, under the previous consultation arrangements, that associated management charges was not an aspect of any qualifying works to be included in the consultation process. If the management charges are considered to be excessive, the real protection of the Act is again to be found in Section 19(1).

The Background

12. The property comprises a five storey period building constructed c.1880 with a three storey right hand side addition added at a later date. It would seem that the property was divided into some 21 flats in about 2004. It is now apparent that the quality of those conversion work was extremely poor. When the render was removed in 2014, it was apparent that the extension had been constructed with lightweight autoclaved blockwork.

13. On 5 February 2010, this Tribunal gave its determination in LON/00BE/LSC/2009/0423. This involved two applications by six tenants. At the time, the landlord was Jyoti Investments Ltd. The Tribunal was not impressed by the conduct of the then landlord and made findings of fraud. However, the extent of the defects to the property was not then apparent.

14. On 13 March 2014, the Tribunal issued its determination in LON/00BE/LDC/2013/0150. By this date, the current landlord had

acquired the freehold interest. In early autumn of 2013, the landlord consulted on a package of works which were estimated at £79,933. On 13 October 2013, the works commenced. When the contractors were on site, it became apparent that substantial extra work was required. At the date of the tribunal hearing, the cost of the works had escalated to £525,769. On 23 December 2013, the landlord applied for dispensation from the statutory duty to consult. A number of tenants opposed the application, including Mr Gough. The Tribunal granted dispensation in respect of these "remedial 'additional' works". The Tribunal was told that the additional works had commenced in January 2014. These had been identified as being essential by Jarvis Blake and Glenwright Limited to avoid the building significantly deteriorating into an unsafe condition. The tenants contended that the additional works should have been evident and identified at an earlier stage. However, the tenants recognised that the works were required. The Tribunal was satisfied that the tenants had not been prejudiced by the decision to proceed with the additional works without undergoing another consultation exercise. It noted that that any concerns that the late identification of the works might have increased the overall cost of the works was not a matter for the Tribunal in the application before it. Mr Bates informed the Tribunal that the landlord would not be seeking to recover the legal costs relating to this application.

15. On 11 June 2014, Ms Jones notified the tenants that there would be additional costs over and above the revised figure of £525,769. She sent the tenants a report from Mr Hastings (see A13 of the Bundle). The landlord hoped to provide details of those costs in 10 days. On 20 June (D8), Ms Jones wrote apologising for the delays in computing the additional costs.

16. On 6 October (at A16), Ms Jones sent the tenants a further letter describing how the costs of the works had now increased to £573,147. There was now a shortfall of £47,378. She referred to the instalment plan that it was willing to accept from individual tenants. Mr Hastings described to the Tribunal how he had regularly visited the property and had spoken to the tenants, including Mr Gough, Mr Xenophontes and Ms Beehary on a number of occasions.

17. On 27 October 2014 (at A19), ten tenants (including Mr Gough, Mr Xenophontes and Ms Beehary) wrote to the landlord contending that the they had been assured that the revised schedule of works was "exhaustive and comprehensive". There had been no consultation in respect of the further works and their liability was restricted to £250 for each tenant. Mr Bates argued that in the light of this letter, the landlord had had no option but to issue its current application to the Tribunal.

The Tribunal's Determination

18. The primary issue for this Tribunal is whether or not the landlord was obliged to embark on a further consultation exercise in respect of the additional works. If so, the Tribunal must further consider whether 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.

19. Mr Bates referred the Tribunal to the management agreement between the landlord and CPM (at Tab F). He also referred us to the decision of *Marionette Ltd v Visible Information Packaged Systems Ltd.* The Tribunal accept his argument that any management charge does not fall within the scope of the Section 20 consultation requirements. If any tenant wishes to challenge the reasonableness of any management fee that is charged, this must be subject to a separate Section 27A application to the Tribunal.

20. In his evidence, Mr Hastings stated that Daniel Renovators Limited, the contractor, had been selected by the tenants. He described how the need for the additional works only became apparent as the additional works progressed. He referred us to a number of photographs. The property had been rendered (photo 61). The defective structure behind the brickwork only became apparent when this was removed in February 2014 (photo 17). Had the landlord consulted on the additional works, the contractors would have had to stop work and costs would have escalated. The defects found on the balconies were illustrated at photos 15, 35 and 36. Defects were found to the lintels in March and April 2014 when the building was opened up (photos 38 and 57). Had works stopped, additional scaffolding costs would have been incurred. Southwark's building control had visited on a number of occasions, the last visit being on 16 September 2014.

21. Mr Bates referred the Tribunal to *Francis v Phillips*. The Tribunal is satisfied that the additional works were all within the scope of the works for which dispensation was granted on 13 March 2014. It was the same contractor. All the works were executed as a single contract. Indeed, Mr Bates stated that the contractors had agreed to absorb some of the additional costs that had been incurred. The works were all of a similar character, namely urgent works to protect the structure of the property. Those works were largely necessary because of the very poor quality of the conversion works executed in 2014. Indeed, it is probable that the then landlord applied render to conceal the botched nature of its conversion.

22. Mr Bates argued that in the light of the tenant's letter, dated 27 October 2014 (at A19), the landlord had had no option but to issue its current application to the Tribunal. The Tribunal is not satisfied that it was. Mr Bates was unable to produce any response to this letter. He suggests

that there may have been "without prejudice" correspondence. The landlord was unable to produce the pre-action correspondence that one would normally have expected. The landlord did not set out its case for contending that no separate Section 20 consultation was required. Neither, did it raise the separate issue of the additional management charge.

23. If the Tribunal is wrong in our conclusion that no further Section 20 consultation was required, we have had no hesitation in granting dispensation. None of the tenants have suggested that these additional works were not required. Substantial additional costs would have been incurred had the contractors been taken off site. Scaffolding had been erected and additional hire costs would have been incurred. Further, once the structure had been exposed, additional works were required urgently to prevent further structural deterioration. No tenant has established that they have suffered any prejudice.

24. If the tenants seek to establish that the final cost of the works is now higher because of the landlord's failure to identify the need for the works at an earlier stage, that is a matter for a separate application by the tenants pursuant to Section 27A of the Act. The same applies to the payability and reasonableness of the management fee.

25. The tenants have applied for an order under section 20C of the 1985 Act. The Tribunal determines that it is just and equitable in the circumstances to make an order so that the landlord may only pass on through the service charge 40% of its costs incurred in connection with these proceedings before the Tribunal. The Tribunal has regard to two factors: (i) there has been no adequate pre-application correspondence; and (ii) the landlord's position before the Tribunal was that there was no statutory requirement to seek dispensation from the consultation requirements in respect of either the additional costs of the major works or the management charge. We do not accept Mr Bates' argument that the landlord was compelled by the tenants' letter, dated 27 October 2014, to make the application. The landlord could, and should, have responded explaining why the additional works fell within the scope of the works for which dispensation had already been granted. Further, the landlord failed to address its mind as to whether any dispensation was required in respect of the management charges.

Judge Robert Latham
2 April 2015