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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UB/LDC/2016/0017**
Property	:	**34, 38, 44, 46 and 50 Mistley Path, Vange, Basildon, Essex SS16 4AN**
Applicant	:	**Basildon Borough Council**
Respondents	:	**Olubukola Omobolanle Amao (34) Michelle Eleanor Landon, Patrick David Leacy & Nicholas Joseph Leacy (38) Leah Toni Farrow (44) Horizon Developments UK Ltd. (46) Sain Louise Frame (50)**
Date of Application	:	**10th June 2016**
Type of Application	:	**for permission to dispense with consultation requirements in respect of qualifying works (Section 20ZA Landlord and Tenant Act 1985 ("the 1985 Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair) David Brown FRICS**

DECISION

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1. The Applicant is granted dispensation from further consultation requirements in respect of works undertaken between the 16th May and the 31st May 2016 to repair/renew the underground burst water main and relay the path to the block in which the properties are situated.

Reasons

Introduction

2. This is an application for dispensation from the consultation requirements in respect of 'qualifying works' to the water system of the building in which the properties are situated, following a series of works to the system of this 60's built block which is of brick cavity wall construction under a flat roof.

3. The technical evidence produced by the Applicant is from Ken Stokes who describes himself as a Responsive Repairs Surveyor in the Applicant's

Housing Property Services Department. He says that there was a leak to the water main in 2015. It was reported on the 27th May, the contractors visited on the 5th June and by the 10th July a section of copper pipe had been replaced by poly pipe.

4. On the 14th January 2016, it was found that another section of the pipe had burst and that further section was replaced by the 10th March 2016. There was then a further leak reported on 15th April 2016 and it was then felt that the whole pipe would need to be replaced "*due to the deterioration of the pipework*". The Applicant was going to consult the leaseholders but on the 6th May 2016, Mr. Stokes says that he was visiting a block nearby when he noticed that things had got much worse and there was then, according to him, a health and safety hazard which required an urgent remedy. However, it took over 3 weeks for the work to be done for some reason which is not explained.

5. A letter was sent to the Respondents on the 16th May informing them that these works were being undertaken as a matter of urgency and giving an estimate of cost.

6. The Tribunal chair issued a directions order on the 15th June 2016 i.e. the day after the application was received, timetabling this case to its conclusion. The Tribunal indicated that it would deal with the application on the basis of written representations and the appropriate notice was given to all parties with a proviso that if anyone wanted an oral hearing, then arrangements would be made for this. Similarly, the Tribunal did not consider than an inspection would be necessary but offered the facility of an inspection. No request was made for either an inspection or an oral hearing.

7. The Applicant filed and served its evidence. The only Respondent to object was Miss. Farrow from 44 Mistley Path. She complains about the delays in doing the works and that she is being charged at all, bearing in mind that she only became a long lessee at the beginning of May 2016 i.e. after the decision had been taken to carry out the work.

The Law

8. Section 20 of the 1985 Act limits the amount which lessees can be charged for major works involving a cost of more than £250 to each tenant unless the consultation requirements have been either complied with, or dispensed with by a Leasehold Valuation Tribunal (now called a First-tier Tribunal, Property Chamber). The detailed consultation requirements are set out in the **Service Charges (Consultation Requirements) (England) Regulations 2003**. These require a Notice of Intention, facility for inspection of documents, a duty to have regard to tenants' observations, followed by a detailed preparation of the landlord's proposals.

9. The landlord's proposals, which should include the observations of tenants, and the amount of the estimated expenditure, then have to be given in writing to each tenant and to any recognised tenant's association. Again there is a duty to have regard to observations in relation to the proposal and the landlord must give its response to those observations.

10. Section 20ZA of the Act allows this Tribunal to make a determination to dispense with the consultation requirements if it is satisfied that it is reasonable so to do.

The Lease terms

11. Copies of the leases of the properties were produced. They provide that the landlord is responsible for keeping the structure, including the pipes serving the building, in repair together with the common parts, subject to the tenants paying a reasonable proportion of the cost. The landlord also has to insure the block and the reserved property.

Discussion

12. All the Tribunal has to determine is whether dispensation should be granted from the full consultation requirements under Section 20ZA of the 1985 Act. There has been much litigation over the years about the matters to be determined by a Tribunal dealing with this issue which culminated with the Supreme Court decision of **Daejan Investments Ltd. v Benson** [2013] UKSC 14. That decision made it clear that a Tribunal is only really concerned with any actual prejudice which may have been suffered by the lessees or, perhaps put another way, what would they have done in the circumstances?

Conclusions

13. The evidence clearly shows that there was a serious problem with the water main and that remedial work was needed. The Applicant says that it intended to consult but that things became worse and this resulted in a health and safety risk which, according to Mr. Stokes, involved "*a dangerous and impassable walkway*". As has been said, there is no explanation as to why such a risk took over 3 weeks to deal with. Despite that, there is no evidence to suggest that the cost would have been any different if the consultation had taken place and the Tribunal is therefore driven to the conclusion that no prejudice has been suffered i.e. that dispensation should be granted.

14. However, it should be made clear that this is not an application for the Tribunal to determine whether the costs incurred are reasonable and it does not do so. Nevertheless, if any tenant wants to challenge the cost of this particular work in any subsequent application, he or she will have to provide some clear evidence that the work could have been done more cheaply on reasonable enquiry within the time frame open to the Applicant.

15. There is another big question outstanding, namely why the Applicant needed to undertake 3 lots of work to this pipe. The first burst resulted in part of the pipe being replaced. Did it not occur to the Applicant that if one section of this copper pipe needed replacing, it was possible, to say the least, that the whole pipe needed replacing. Thus, there are questions to be answered. Were any other parts of the pipe exposed for inspection? Even if the second repair was necessary, did it not occur to someone even at that stage that the whole pipe then needed replacing? Was it necessary, as Mr. Stokes says, to replace the whole pipe in this contract when 2 sections had already been replaced?

16. It may well be that there are answers to these questions. If so, they need to be given to the Respondents when any demand for money is sent out. The

Tribunal would also like to comment on the evidence of Tina Byrne from the Applicant when she says, in answer of a question raised by the Tribunal, "*no insurance claim was investigated by Basildon Borough Council as the works are to the block and therefore each Leaseholder will be invoiced their proportion of the cost of works as per the terms of the lease. It will be the responsibility of each Leaseholder to make a claim under their Buildings Insurance if they wish to do so*". She also says that no insurance claim was investigated "*as the works are to the block*".

17. With respect, these comments fail to understand that the insured is the Applicant, not the leaseholders. The Applicant insures both the block and the reserved property which includes the pipe in question. There is no evidence available to the Tribunal about the full extent of the insurance cover and no evidence that the Respondents know the extent of the cover either. The Applicant, as with all sensible landlords, made sure that it arranged buildings insurance. However, the consequence of this is that it is the Applicant who has to marshal and make any claim. The leases contain an implied, if not an express term, that in the event of the landlord being aware of a cost which can be recovered from insurers, it should advise the leaseholders and ask whether they want the Applicant to make a claim.

18. Finally, the Tribunal has considered Miss. Farrow's comments. The timing of this was, indeed, unfortunate. However, as a matter of law, a buyer of either a freehold or a long leasehold interest in property, takes the property in the condition it is in at the date of purchase. If work is required, then if the cost of that work is incurred after the purchase, the new buyer is liable to pay it.

19. Nevertheless, it is clear that on 19th April 2016, the Applicant was aware of this potential expense and knew, as at that date, that it would have to meet the part of such expense attributable to 44 Mistley Path. As the only consultation letter was not sent out until almost a month later, Miss. Farrow wasn't so aware. She should have been warned. If she wasn't, there is a case for saying that she should have been told so that she could have negotiated an agreement with the Applicant – or at least she should have been advised that as a simple matter of fairness and reasonableness in order to avoid possible accusations of misrepresentation, she could delay the completion of her purchase until the expense had been incurred and discharged.

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Bruce Edgington
Regional Judge
9th August 2016

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.