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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/45UH/LDC/2017/0055**
Property	:	**Fairfields** **15 Broadwater Road** **Worthing** **BN14 8AD**
Applicant	:	**J H Watson Property Investment Ltd**
Representative	:	**Watson Management Ltd**
Respondents	:	**The Lessees of 20 flats listed in the application**
Type of Application	:	**Dispensation from Consultation** **Section 20ZA Landlord and Tenant Act 1985**
Tribunal Member	:	**Mr BHR Simms FRICS (chairman sitting alone)**
Date of Hearing	:	**17 & 30 November 2017 – documents only**
Date of Decision	:	**30 November 2017**

DECISION

SUMMARY OF THE DECISION

1. The Tribunal grants the Applicant dispensation from the consultation requirements in respect of the additional works already undertaken to comply with the Abatement Notice issued by Adur & Worthing Councils on 23 May 2016 described in paragraph 1 of the 'Grounds' section of the application form.

THE APPLICATION

2. The application form dated 04 July 2017 was received in the office on 07 August 2017 and is for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 ("the Act") in respect of works undertaken to further comply with an Abatement Notice.

3. On 25 August 2017 the Tribunal directed that the application is to be determined on the papers without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 and no party objected to this procedure. The Tribunal proceeded to determine the case on papers alone without a hearing. The correct fee required was received on 11 September 2017.

4. The Applicant was directed to send a copy of the application form with any attachments together with the formal Directions to each leaseholder and to confirm that this had been done. The Tribunal received confirmation by email from Mr. Foakes of Watson Property Management on 13 September 2017 that this would be done the following day.

5. The Tribunal directed the Respondents to indicate whether they agreed with the Application and whether they wished the Tribunal to hold a hearing. Eight responses covering 11 flats were received none objecting to a determination without a hearing.

6. The relevant legal provisions are set out in Appendix II to this decision.

7. The Tribunal did not initially make an inspection of the Property. The Applicant describes the property as a residential apartment block of 20 units on 4 floors. The freehold of three quarters of the building is owned by the Applicant and the remainder by another party Mr P Milward who is not affiliated to the Applicant. This description raised concerns with the Tribunal as it implied that another person owned part of the freehold of Fairfields, further enquiries were made of the Applicant.

8. Based on the responses received and on a photograph supplied by the Applicant it would appear that the Applicant's description is misleading. The part of the 'building' owned by Mr Milward is a separate semi-detached property that is not part of Fairfields, probably 17 Broadwater Road. A copy of the Land Registry plan shows the subject premises comprising a semi-detached building containing all 20 flats.

THE LEASES

9. The Applicant supplied a copy of the lease of flat 9 dated 16 April It is understood that all leases have similar wording. The Tribunal briefly considered the terms relating to repair and service charges.

10. In accordance with the lease supplied the lessees are required to pay a Service Charge being a specified percentage contribution to the costs incurred by the landlord in carrying out its obligations under the lease for repair maintenance and insurance set out in clause 5(5).

11. The Fifth Schedule sets out the arrangements for the payment of an Interim Charge on account of the Service Charge. If the Interim Charge paid during an accounting period produces a surplus or under payment then there are arrangements to carry forward a surplus or collect an excess.

THE PARTIES' REPRESENTATIONS

12. The Applicant explained in the application form that major works have been carried out to prevent water ingress into flats 11 and 16 and S.20 consultation was carried out in May 2016 but the repairs were unsuccessful and the Council issued an Abatement Notice. Because of the urgency, further works were undertaken without a proper S.20 consultation, and it is these works that are the subject of this application. A copy of the relevant part of the application form detailing the works is included as Appendix I attached hereto.

13. The Applicant was directed to send each Respondent a standard form to be returned to the Tribunal and to the Applicant's agent indicating whether the application was supported or not. There were 8 responses covering 11 of the 20 flats each supporting the application.

14. A bundle of documents was supplied to the Tribunal by the Applicant with a copy to each lessee. It contained in addition to the original application and further documentation as follows:

    i. Some unidentified photographs of the damaged roof.

    ii. Copies of the lessee reply forms.

    iii. A photographic report dated 06.12.16 prepared by Watson covering parts of the interior of the common ways and flats 11 & 16 and one unidentified parking space.

    iv. The Abatement Notice issued by Adur & Worthing Councils dated 23 May 2016 and an email dated 17 February 2017 from the Councils indicating that the Abatement Notice will be revoked.

15. The Tribunal also received copies of an exchange of emails between the Case Officer and Mr Foakes of Watson chasing receipt of the case Bundle.

THE LAW

16. The 1995 Act provides the Respondents with safeguards in respect of the recovery of the Applicants' costs in connection with the works to the property through the service charge. Section 19 ensures that the Applicants can only recover those costs that are reasonably incurred on works that are carried out to a reasonable standard. Section 20 gives the Respondents an additional safeguard when the works carried out on the property are qualifying works which are defined as works on a building or any other premises, and the costs of those works would require the Respondents to contribute under the service charge more than £250 in any 12 month accounting period. When these circumstances exist, the additional safeguard is that the Applicants are required to consult in a prescribed manner with the Respondents about the works. If the Applicants fail to do this, the Respondents' contribution is limited to £250, unless the Tribunal dispenses with the requirement to consult.

17. This application is concerned with the further additional safeguard of section 20. The question for the Tribunal is whether the works are so urgent as to make the requirements to consult unnecessarily restrictive and time consuming. The questions of whether the costs of those works will have been reasonably incurred and whether those works are to reasonable standard are not a matter for this particular Tribunal. The Respondents are entitled to put in another application challenging the reasonableness of the costs incurred and charged to the service charge and the standard of those works if they wish.

18. Section 20ZA of the 1985 Act is the authority which enables the Tribunal to dispense with the requirement for the Applicant to consult with the Respondents on the costs and nature of the proposed works. The dispensation may be given either prospectively or retrospectively. In this case the Applicants are asking for retrospective dispensation.

19. Section 20ZA does not elaborate on the circumstances in which it might be reasonable to dispense with the consultation requirements. On the face of the wording, it would appear that the Tribunal has a broad discretion. That discretion, however, has to be exercised in the context of the legal safeguards given to the Respondents under sections 19 and 20 of the Act. This was the conclusion of the Supreme Court in *Daejan Investments Ltd v Benson and Others* (*Deajan*) which decided that the Tribunal should focus on the issue of prejudice to the tenants in respect of their statutory safeguards.

20. Thus the correct approach to an application for dispensation is for the Tribunal to decide whether and if so to what extent the Respondents would suffer relevant prejudice if unconditional dispensation was granted. The factual burden is on the Respondents to identify any relevant prejudice which they claim they might have suffered.

THE FINDINGS

21. Under section 20 the Applicant is required to go through a two stage process of consultation[1]. The first stage involves the giving of a notice of intention to carry out the works. There is no evidence that the Applicant or its managing agent has had any communication with the lessees explaining their responsibilities under the lease or their likely financial liability under the service charge. There may have been such correspondence but the Tribunal is not aware of it.

22. The Tribunal is satisfied that, although some of the lessees may be aware of the repairs required, because of the urgency there has been no initial notice in any reasonable or clear form regarding the additional works, the subject of this application.

23. The immediate danger of further water ingress was in part remedied by the provision of temporary tarpaulins and some repairs that were ineffective. Additional works had to be urgently undertaken. It is unclear to the Tribunal whether these further works have been effective. But this determination makes no finding on this issue.

24. The second stage of the process requires the Applicants to supply a statement of estimates and a response to any of the Respondents' comments arising from the Notice of Intention. The Tribunal formed the view that, as the cost is not yet known, the lessees have been severely prejudiced as the work proceeded without proper consultation as the likely individual liability is not yet known.

25. In this case the circumstances can be distinguished from *Deajan* in spite of there being no specific prejudice expressed by the Respondents. The form circulated to the lessees in response to the Tribunal's Directions makes no reference to prejudice or the reason why such prejudice might arise. The lessees are only asked to express, by completing and returning the form, their objection, or not, to the application itself. In addition the form simply identifies urgent works to the roof which the lessees no doubt identified in detail from the application form.

26. From the evidence submitted there have been no estimates, so the lessees were unaware of their likely liability in cost or the prejudice that may arise from them being excluded from a consultation process. There has been no initial notice or anything resembling an explanation to the lessees of the management company's intentions regarding the additional works. The Respondents have received a copy of this Tribunal's Directions where a brief description of the works is given. The emphasis is on urgency and, to an unrepresented party, the impression given is that there is nothing more to do as the work is complete and the question of urgency has been removed.

27. In *Daejan* the works were finished also but the estimates were available so the lessees had a pretty good idea of what was involved, it was just the formal consultation process itself that needed to be dispensed with, but not here.

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[1] See Part 2 of Schedule 4 to the Service Charges (Consultation Requirements (England) Regulations 2003.

28. Although not expressly identified by the lessees the Tribunal has no hesitation in finding that the Respondents must have already suffered severe prejudice because consultation was not undertaken in its full form however there is sufficient evidence to show that to delay the commencement of the works in order to allow full consultation would have, in itself, caused additional severe prejudice.

29. As the important second stage consultation regarding estimates and the lessees' comments has had to be omitted because of the urgency of the repairs, the costs included in the service charge will no doubt be put under special scrutiny when the budget and accounts are presented.

DECISION OF THE TRIBUNAL

30. The Tribunal grants the Applicant dispensation from the consultation requirements in respect of the additional works already undertaken to comply with the Abatement Notice issued by Adur & Worthing Councils on 23 May 2016 described in paragraph 1 of the 'Grounds' section of the application form a copy of which is attached as an appendix hereto.

B H R Simms (chairman)

30 November 2017

APPEALS

RIGHTS OF APPEAL

1. 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.

2. 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.

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

4. 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

APPENDIX I

Please use the space below to provide information mentioned in section 7 of this form.

You will be given an opportunity later to give further details of your case and to supply the Tribunal with any documents that support it. At this stage you should give a clear outline of your case so that the Tribunal understands what your application is about. Please continue on a separate sheet if necessary.

1. Describe the qualifying works or qualifying long-term agreement concerned, stating when the works were carried out or planned to be carried out or in the case of a long-term agreement, the date that agreement was entered into or the proposed date it is to be entered into.

Major roof works totalling £8700 were carried out to stop water ingress to flat 16 and 11 which had been suffering from water ingress for several months.

We carried out a full section 20 process in May 2016. The time this process took resulted in more damaged been caused to the affected flats because the repairs were unsuccessful.

The affected flats were then declared as uninhabitable by Adur & Worthing council and as a result issued a abatement notice. As part of this abatement process we were given a set period of time to complete the necessary works. To Comply with the abatement notice and ensure the works were completed in time we began work on the property as soon as possible.

Below is a list of the works that were undertaken.

Stripped front gable..removed felt and batten,and tiles.

Refelted and battened gable.

Retired gable.

Stripped end of west flank.redesigned run between parapet and flank.

GRP 'ed run ,opening it from 60mm to 150 mm getting water off quicker. refelted ,battened

and retiled said flank.

Opened up outlet in centre of building from 70 mm to 120 mm getting water away faster.

Building out collapsed moulding on balcony below roof.

Stripping 3500 metres of roof on west flank back to flat roof refelted and battened.

Retiled flank.

Aqaupoled all the top of parapet wall.

APPENDIX II

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 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.]