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HM Courts & Tribunals Service

Leasehold Valuation Tribunal

In the matter of S.20C (limitation of costs) and S.20ZA (dispensation of consultation requirements) Landlord & Tenant Act 1985 and
Service Charges (Consultation Requirements) (England) Regulations 2003

CONFIRMATION of DECISION, FURTHER DECISION (20C) & REASONS

Case Number:	CHI/43UD/LDC/2012/0028
Property:	The Red House Lutyens Close EFFINGHAM Surrey KT24 5AD
Applicant:	Monkey Puzzle Estates Ltd
Represented by:	Huggins Edwards & Sharp
First Respondent:	Mr R J J Lask (The Lodge) – Not represented.
Second Respondent: Represented by:	Mr A Wickham & Miss B Roscoe (East Wing) Miss Roscoe (In person)
Third Respondent: Represented by:	Mr R Eshelby (West Wing) Ms Shenda Canacott
Witness:	Mr D Buckell (DSB Building Services)
Date of Application:	09 August 2012
Date of Inspection & Hearing:	08 November 2012
Date of these reasons:	10 December 2012
Tribunal Members:	Mr B H R Simms FRICS MCIArb (Surveyor Chairman) Mr R Potter FRICS (Surveyor Member) Ms J Dalal (Lay Member)

CONFIRMATION OF DECISION

1. Confirmation of oral decision announced at the Hearing in accordance with Regulation 18(2) Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003.

2. The Tribunal determines not to dispense with all the S.20 consultation requirements in respect of the work identified in quotation number Q1100 and invoiced on 17 July 2012, and identified in quotation number Q1117 and invoiced on 24 August 2012 both by DSB Building Services.

3. The Tribunal however does dispense with the S.20 consultation requirements for any work now required to deal directly with the further outbreak of dry rot identified by Mr Harvey of Huggins Edwards & Sharp by telephone call to the tribunal office and pointed out at the inspection.

FURTHER DECISION (20C)

4. The Tribunal ORDERS that all costs incurred or to be incurred in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Tenants.

INTRODUCTION

5. This is an Application by Messrs Huggins Edwards & Sharp (Huggins) on behalf of their client Monkey Puzzle Estates Ltd the Landlord of the property, for dispensation of all or any of the S.20 consultation requirements in respect of qualifying works identified in the application form as having been carried out in July 2012 in accordance with S.20ZA of the Landlord & Tenant Act 1985 (the Act). The Tribunal received under separate cover a copy of the lease of the West Wing.

6. Directions for the conduct of the case were initially made on 17 August 2012 on the basis of a determination based on documents only without an oral hearing. Those Directions required the Applicant to provide a Statement of Case with supporting documents to the Respondents by 28 August 2012. By 29 August 2012 the Second Respondent had received nothing from the Applicant and wrote to the tribunal office on that date to record the fact and, amongst other things, objected to the documents only procedure and requested an oral hearing.

7. Consequently a procedural chairman considered and granted the request by issuing revised Directions dated 3 September 2012 for an oral hearing on 8 November 2012.

8. The Documents appeared to have crossed as the tribunal office and the Respondents and the Tribunal eventually received a letter from Huggins dated 28 August 2012 giving an outline of its case with some supporting documents.

9. In the revised Directions the Applicant was required to supply any additional documents and prepare a completed numbered and paginated bundle of documents and bring it to the hearing. This was not done and the Tribunal relied on the letter dated 28 August 2012 and enclosed documents.

10. The First and Third Respondents did not submit any statements or documents either prior to or at the hearing.

11. The Second Respondent followed the original Directions and provided the tribunal office with a comprehensive response to the Applicant's case in writing dated 30 September 2012.

THE LAW

12. The statutory provisions primarily relevant to this application are to be found in Sections 20, 20C and 20ZA of the Landlord & Tenant Act 1985. The Tribunal has of course had regard to the whole of the relevant sections of the Act and the appropriate Regulations or Statutory Instruments when making its decision, but here sets out a sufficient extract or summary from each to assist the parties in reading this decision.

13. S.20 of the Act provides that where there are qualifying works, the relevant contributions of tenants are limited unless the consultation requirements have been either complied with or dispensed with by the determination of a Leasehold Valuation Tribunal.

14. In order for the specified consultation requirements to be necessary, the relevant costs of the qualifying work have to exceed an appropriate amount which is set by Regulation and at the date of the application is £250 per lessee.

15. Details of the consultation requirements are contained within a statutory instrument entitled Service Charges (Consultation Requirements) (England) Regulations 2003, SI2003/1987 (the Regulations). These requirements include, amongst other things: an initial Notice of intention to carry out the works; a duty for the landlord to have regard to any comments received and to obtain estimates for the work from at least one unconnected contractor; and for the landlord to advise the tenants with a statement of the amounts of the estimates received and make them available for inspection.

16. S.20ZA provides for a Leasehold Valuation Tribunal to dispense with all or any of the consultation requirements if it is satisfied that it is reasonable to do so. There is no specific requirement for the work to be identified as urgent or special in any way. It is simply the test of reasonableness for dispensation that has to be applied (subsection (1)).

17. Section 20C provides for a limitation of service charges relating to the costs of Tribunal proceedings. A tenant may make an application for the tribunal to order that any costs in connection with the Tribunal proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge.

THE LEASE

18. The Tribunal was provided with a copy of the lease of The West Wing, one of the three separate properties comprised in the Red House. It is dated 27 April 2011 and is between the original Landlord Dialworth Ltd and the current Tenant Richard Eldred Eshelby the Third Respondent. The Tribunal was not supplied with leases of the other parts of the building and it is not known if they are in a similar form.

19. Although the Tribunal had regard to the full lease, little turned on its interpretation during the course of the representations made to it as it is concerned solely with a 20ZA application for dispensation of consultation.

20. There are covenants for the landlord to provide the Building Services set out in part one of the Fourth Schedule and the Estate Services set out in part two of the Fourth Schedule. These cover the usual repairs and maintenance of the property. Elsewhere in the lease are provisions for calculating and collecting the service charges and costs of the landlord's insurance.

21. There were no matters raised by the parties in respect of the interpretation of the lease that are within the jurisdiction of this Tribunal.

INSPECTION

22. In company with Mr Harvey and others for Huggins, Ms Roscoe and Ms Canacott, the Tribunal members inspected the West Wing property. The sub-tenants Mr & Mrs Walter were present and Mr Buckell also attended. The Tribunal members then inspected the exterior on their own.

23. The West Wing comprises part of the Red House which is a detached house built of brick and tile now divided into the West and East Wings with a separate Lodge. There is a private drive and car parking area also used by the adjoining mews properties.

24. The Tribunal members were shown the areas of concern in the West Wing comprising the dividing wall between the Entrance Hall & Kitchen and the Living Room, the external flank wall to the Kitchen and Living room and the repaired plaster areas. The Tribunal also saw a dry rot fruiting body growing from beneath the skirting board on the Living Room/Hall wall.

HEARING

25. A Hearing took place at The Harlequin in Redhill.

26. The Tribunal had regard to the the written evidence before it and took oral evidence from Mr Harvey, Ms Canacott, Miss Roscoe and Mr Buckell.

27. With the Parties' consent the Tribunal accepted a set of photographs showing the dry rot fruiting bodies that were present both internally and externally that gave rise to the first tranche of remedial work.

28. Mr Harvey, for Huggins, outlined his client's case. In May 2012 the Lessee of the West Wing Mr Eshelby became aware of an outbreak of dry rot in the property. Without reference to the managing agents Mr Eshelby instructed a surveyor, Mr Patrick Amos, to report on the problem. A summary, undated, report from Mr Amos was prepared for Mr Eshelby following an inspection on 23 May 2012. Mr Eshelby obtained a quotation from DSB Building Services (DSB) and instructed that firm to carry out the work required.

29. At some time, probably in late June, Mr Eshelby or Ms Canacott eventually advised Huggins what had occurred. Mr Eshelby, it seemed, was not aware of any of the requirements of S.20 consultation and, as Huggins believed that the cost of the work may be recoverable from the Lessees under the terms of their leases, pointed out to Mr Eshelby the correct procedure.

30. Huggins were concerned that there should be no delay in proceeding with the work but did not take over the matter on behalf of their client.

31. By email dated 23 June to DBS and Ms Canacott from Mr Walton, the occupier of the West Wing, he advises his immediate landlord of new outbreaks. The surveyor, Mr Amos, was again consulted by Mr Eshelby and emailed him confirming that there were still dry rot fungus spores in the walls. Still Huggins took no action and allowed Mr Eshelby to again instruct DBS to carry out work in accordance with their quotation number Q1117.

32. On 15 August 2012 Huggins wrote to the Lessees a letter concerned mainly with the annual budget, the deposit account, insurance cover, payments of service charges and proposals for 2012/13. Under this latter heading it was stated that there was a requirement for dry rot treatment in the West Wing. The Lessees were advised that an application for dispensation of the consultation requirements had been made to the Tribunal. No further details or costings were provided.

33. In oral evidence, as it was unclear from his written Statement, Mr Harvey confirmed that dispensation was requested on the grounds of urgency.

34. Mr Buckell gave evidence that he had been instructed by Mr Eshelby or Ms Canacott to remove the fungus and clean down the area some time prior to 23 May. He had had further contact with Mr Eshelby and the surveyor, Mr Amos, and had undertaken the work in accordance with instructions from Mr Amos around 2 July. He had not received any instructions from Huggins.

35. The Applicant's Statement also seeks approval from the Tribunal for the Freeholder to recover the cost of the work so far undertaken from the Lessees in accordance with the service charge provisions in the lease. The Applicant goes on to ask the Tribunal to order that the application fee shall be reimbursed and the managing agents fees for making the application can be recovered via the service charge.

36. The First Respondent has taken no part in these proceedings.

37. In their written Statement the Second Respondent asks the Tribunal not to dispense with the consultation requirements. Firstly they dispute the ability of the Tribunal to grant dispensation at all after work has been completed. If the Tribunal can so determine they then put forward succinct grounds for the Tribunal to refuse to grant dispensation.

38. Firstly the S.20 consultation process is designed to protect lessees and to give them an opportunity to participate in a consultation so that they are not taken by surprise when asked to contribute towards the costs. That opportunity has already been lost in this case.

39. Secondly the Applicant has failed to advance adequate grounds on which dispensation can be reasonable.

40. Thirdly, as had become clear in the proceedings, Mr Eshelby, the Third Respondent, is the son of a controlling Director of the Applicant company. This company, it appeared, had not incurred any direct expense.

41. There then follows a detailed chronology of the matter following fairly closely the Applicant's outline. It is stated that because of the delays in undertaking the work and the inadequacy of the first repairs there has been ample time for consultation. This is even more the case bearing in mind the more recent outbreak.

42. The Tribunal is referred to the Court of Appeal case of **Daejan Investments Ltd – v – Benson and Others** *[2011] EWCA Civ 38* and, in the Upper Tribunal, **Steanu Properties Ltd – v – Leek and Others** *[2010] UKUT 478 (LC)*. In *Deajan* it was held that significant prejudice to the tenants was "a consideration of first importance" when excercising the dispensatory discretion. In *Steanu* it was said that a proper consultation process should give tenants confidence in the decisions that are reached and feeling as comfortable as they can be with the service charges that may flow from those decisions.

43. The Lessees have been significantly prejudiced and have not had the opportunity to feel confident or comfortable with the process. The Second Respondent submits that the Landlord has not acted reasonably and the Application should be dismissed.

44. The Third Respondent has incurred the cost of the work and is expecting to recover the full amount from the Landlord who he expects to recover the cost by way of the service charge. He therefore supports the application for dispensation.

45. S.20C: In their Statement the Second Respondent asks the Tribunal to exercise its discretion and make an order limiting the recovery of costs. It is their view that the application is misconceived, lacks in a proper evidential basis and is verging upon an abuse of the tribunal's discretion.

46. The Applicant believes it had no alternative but to make an application in order to allow recovery of the cost of the repair work from the service charge.

CONSIDERATION

47. This is an unusual case where the Applicant Landlord is not the person who has carried out the work to the property or the person who has paid the cost. In both cases it is the Third Respondent that has arranged for the work and paid for it. There is an assumption on the part of the managing agents representing the Landlord that these costs can be recovered by way of the service charge and this has given rise to the application to avoid the recoverable costs being limited to £250.00. That assumption is not a matter that has been considered by this Tribunal as it is outside the 20ZA jurisdiction but it is not a foregone conclusion. It may be for another Tribunal to determine if any costs can be included in the service charge for recovery.

48. In addition to representations made by the Second Respondent in respect of Sections 20C and 27A she also drew the attention of this Tribunal to other issues of concern. Some of these may now fall away following the decision we have made but, for the avoidance of doubt, this Tribunal has not considered any of the additional issues raised. This is not saying whether any of the issues have or have not merit but, if they are to be pursued, they will have to be the subject of another application to another Tribunal.

49. The Tribunal agrees that dry rot outbreaks need urgent attention to avoid the fungus spreading and infecting other parts of the structure. If the Landlord makes an early application to a Tribunal for 20ZA dispensation on the grounds of urgency it will usually receive a favourable hearing.

50. In this case the Landlord or its managing agent has had little or no involvement with the work. If it had, there may have been an opportunity to apply for dispensation earlier. The outbreak of dry rot occurred in May 2012 but it was not until August 2012 that Huggins advised the Lessees, in passing, that there may be an additional bill issued for the cost of the work. No details of the extent of the work, its likely cost, or the Lessees likely contribution, were promulgated.

51. The dry rot has not been cured. There was a second outbreak and now a third. There would have been ample time in the interim for at least part consultation to have taken place but no attempt has been made to do so. It would seem to follow that although we are not judging the efficacy, reasonableness of cost, or need or extent of the work, it has not been successful in dealing with the dry rot outbreak. The result may have been different if consultation had taken place.

52. The Lessees have been substantially prejudiced by the actions of the Lessee of the West Wing with the tacit approval of Huggins on behalf of the Landlord. The work has been completed without a proper result. Following *Deajan* and *Steanu* The Tribunal has no hesitation in refusing dispensation for the work completed at the date of the hearing.

53. The further outbreak identified within a few days of the hearing will need urgent attention but, as the earlier work has proved to be ineffective, a full and proper specification will be needed to eradicate the problem. Urgent work can be undertaken to prevent the spread of dry rot and dispensation is granted but limited to that essential work only.

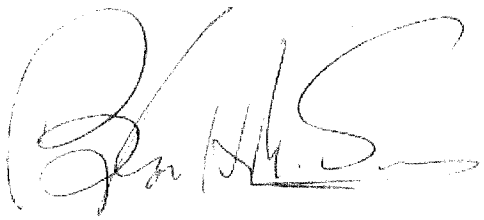
54. The Tribunal recognises the importance of urgent attention to outbreaks of dry rot and encourages the Applicant to proceed with the work in accordance with the lease covenants but in view of the failure of the two tranches of work already carried out to deal effectively with the outbreak the Lessees must be consulted in accordance with S.20.

55. S.20C: If the Landlord had dealt with the outbreak of dry rot in the usual way by arranging for the work and dealing with the contractors and consultation there would have been no need for this application to the Tribunal. Instead the managing agents, on behalf of the Landlord chose not to consider the Lessees at all until several months after the outbreak and after some work had been undertaken. It is accepted that the work was urgent but the method chosen to complete it flies in the face of any requirement to consult with Lessees. It is just and equitable that the Lessees should not have to share in the cost of proceedings including the costs of the application.

56. In the case of the most recent outbreak the application to the Tribunal for dispensation was made orally and dealt with urgently by it. There should be no extra costs incurred by the Applicant in dealing with this part of the proceedings.

57. For the sake of clarification the Tribunal reminds all the parties that either the landlord or the tenant may make an application to the Tribunal under section 27A, or other sections, of the Act for a determination as to the payability and reasonableness of charges either before or after any works. The decision given in this document does not prevent any future application to the Tribunal.

Dated 10 December 2012



Brandon H R Simms FRICS MCIArb
Chairman