

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

**Case Reference** : CHI/29UQ/LDC/2013/0039

**Property** : 74 Mount Ephraim, Tunbridge Wells,  
Kent, TN4 8BG

**Applicant** : 74 Mount Ephraim Ltd

**Representative** : N/A

**Respondent** : Mr T P Tulley  
c/o Mrs S Church  
Mr T M Higgs  
Mr HGR Atwood  
Mrs M Ensor

**Representative** : N/A

**Type of Application** : Section 20za of the Landlord & Tenant Act 1985

**Tribunal Members** : Judge S Lal (Legal Chairman)  
Mr R Wilkey FRICS

**Date and venue of  
Hearing** : Mercure Tunbridge Wells, TN2 4QL  
5<sup>th</sup> August 2013

**Date of Decision** : 6<sup>th</sup> August 2013

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**DECISION**

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**Application**

1. This Application deals with works that the Applicant wishes to carry out to overhaul the roof, including the replacement of all existing slates and battens and other remedial work as well as exterior painting. The matter was subject to a pre Trial Review on 25<sup>th</sup> June 2013.

### **The Inspection**

2. The Tribunal inspected the subject premises on the morning of the hearing. The inspection was carried on a dry day. The subject property consists of one half of a large Victorian detached house that has been converted into four apartments. The front garden of the property is given over to parking and at the rear of the property there is a garden, which leads to the lower ground floor flat. There is a single storey garage at the rear of the garden.
3. The Tribunal was able to carry out a visual inspection of the common parts and the roof in so far as it was visible from ground level. The Tribunal was able to enter Flat 2 and observe the rear of the premises including the garage.

### **The Issue**

4. The application is formulated on the basis that the Tribunal grant dispensation under Section 20ZA of the Landlord and Tenant Act 1985.

### **The Law**

5. The relevant section of the Act reads as follows:

*20ZA Consultation requirements:*

*(1) Where an application is made to a leasehold valuation 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.*

6. The Supreme Court in the case of *Daejan Investments Ltd v Benson* examined the matter in some detail. In summary the Supreme Court noted the following:
  - The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA(1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
  - The financial consequences to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
  - Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
  - The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.

- The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA(1).
- The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.
- The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
- The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

### **The Hearing and Evidence**

7. In terms of the hearing Mr Atwood (Flat 2) and Mrs Ensor (Flat 3) attended. They attended both as Directors of the Applicant company as well as individual Respondents. No one else attended; in particular Mrs S Church did not attend. The Tribunal notes that the only written material before it was received from the Applicant Company and the only item from Mrs Church is a copy of an email sent to Mrs Ensor (and contained in the material submitted by the Applicant) in which she states that she will not be paying anything to the Applicant company

### **The Case for the Applicant**

8. The Tribunal notes that the freehold landlord company, the Directors of which also happen to be the Respondent leaseholders, makes the application. The application form indicates that all leaseholders apparently resided in the same building but now Mr Tulley (Ground Floor Flat) has been taken into care. The Application is now made because those who represent Mr Tulley, that is Mrs Church, has refused to make payment for the latest contribution in the sum of £10,100 per flat.
9. The Applicant has enclosed a Specification of Works prepared by Walrond Fuller, Chartered Building Surveyors and External Inspection Report dated 20<sup>th</sup> July 2013.

10. The Tribunal has considered the contents of the above documents with considerable care and notes the following derived mainly from the summary of the External Inspection Report; the property has been reasonably maintained and there is no backlog of repairs or maintenance.
11. The slating to the roofs and the bituminous flat to the top level of flat roof is getting to a point where significant remedial work will be necessary but that this work is not imperative.
12. However the flat roof slating to the east and north east corners does require urgent attention as the bituminous felt is lifting and this will very quickly deteriorate if high winds are experienced. The author of the Report refers to this being stripped off in a single gale. The chimneystack work is described as not being particularly urgent other than in respect of the flashings as "water penetration can occur" but not to be subject to too much delay.
13. That work that is described as needing the, most urgent attention is the rainwater gutters. The Report suggests that there appears to be significant leakage and some overflow and that this is causing deterioration down the building. The Report argues that the gutters should be dismantled, reset to falls and have new joints seals provided. The Report suggests that when the gutters are removed deterioration will be found to the upper edges of the fascia boards and behind the gutters and therefore the fascia's need to be repaired.
14. In respect of the decorations the Report suggests that they are showing signs of deterioration and the Report argues for decorations, especially to the timber members as needing to be done urgently.
15. The authors of the Report suggest that the area that causes them the most concern is the Eastern Entrance Lobby and the filler joist floor where one or two of the joists are very badly corroded and that this will result in structural failure within 5 years.
16. In summary the Report argues that the works deemed urgent need to be done within the next 12 months.
17. In oral evidence Mrs Ensor described how the Applicant company had been set up in about 1985 by Mr Tully and herself and that various Directors have come and gone but that repairs and maintenance have always been done on the basis of agreement and by use of a maintenance fund. She stated that as the occupier of the top floor flat, she had rainwater coming in and that this had necessitated remedial repair. She mentioned the asphalt roof that was flapping in high wind.

18. Mr Atwood had very helpfully prepared a written synopsis of the case and the Tribunal has had regard to this. Mr Atwood said that s20 consultation had in fact now been started and that the first and second stage letters had been sent out on 5<sup>th</sup> June 2013 and 8<sup>th</sup> July 2013 respectively. He stated that nothing had been received from Mrs Church and the present application was started to really try and save a month or so, the works had been planned to take place at the start of June 2013 but they had been cancelled upon receipt of the email received from Mrs Church dated 29<sup>th</sup> May 2013. He hoped that if dispensation were to be granted he could arrange to be placed back in the timetable of the chosen builder.

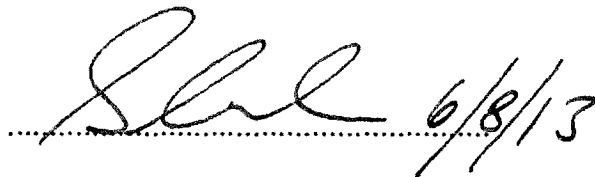
### **The Respondent's Case**

19. The Tribunal has received nothing from Mr Tully and those who represent his interests. The Tribunal only has the email of the 29<sup>th</sup> May 2013 from Mrs Church and in this it is clear that Mr Tully is now in a care home and that the Tully/Church family do not wish to pay anything above £250 as they believe that this will impact on what is left to provide care for Mr Tully.

### **The Tribunal's Decision**

20. The Tribunal has carefully assessed the matter before it. Having heard the evidence of Mrs Ensor and Mr Atwood, it is satisfied that they are honest witnesses who have at all times tried to do their best for the subject premises. It would appear that since the mid 1980's, matters have worked on an amicable basis as between the various Directors and this is reflected in the present state of the building, namely that it would appear to be well maintained for a building of its age, size and construction.
21. However notwithstanding the above the Tribunal, as an expert judicial body, accepts that such a building will from time to time need major works in the manner described in the Walrond Fuller Report. The legal presumption under the Act is that such works will involve consultation although the Act allows dispensation from the same either by agreement or by order of the Tribunal. Clearly in the present circumstances, those who represent Mr Tully have not agreed to the major works, hence the application to dispense.
22. The Tribunal is however satisfied that the Applicant Company has not established proper grounds for dispensation because none of the works described in the Walrond Fuller Report can properly be described as urgent so as to rebut the presumption that consultation will take place. The Tribunal accepts that the current application has been made in good faith and that the work will have to be done in due course but this should form the basis of proper consultation. There was nothing that the Tribunal was able to either see as part of its own inspection or in the documentary material which would suggest that consultation can properly be dispensed with.

23. The Tribunal accepts that consolation under the Act will be a new experience for the Directors because of what has now happened to Mr Tully; nevertheless it is satisfied that the current application for dispensation is misconceived albeit made in good faith. The Tribunal notes that such consultation has in fact started. The Tribunal notes the oral evidence of Mrs Ensor as to water ingress in Flat 3 but it also notes that this was the subject of remedial work and in itself could not form the basis for dispensation.
24. For the reasons above the Tribunal does not grant the present application. The Tribunal notes that if at the end of a proper period of consultation the work is in fact instigated then each of the Respondent's will be liable for their share of cost and the Applicant company has the ability as Landlord to pursue those who will not pay. That could quite properly form the basis of another application to the Tribunal but ultimately that is matter upon which the Applicant Company may wish to take legal advice.
25. The Tribunal makes no further order.
26. 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.
27. 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.
28. 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

 6/8/13

Judge S Lal (Legal Chairman)