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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UB/LDC/2014/0009**
Properties	:	**1-27 Ballards Walk, Basildon, Essex SS15 5HL**
Applicant	:	**Basildon Borough Council**
Respondents	:	**The Long lessees in the list attached to the application**
Date of Application	:	**20th February 2014**
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)** **Roland Thomas MRICS** **Cheryl St. Clair MBE BA**
Date and venue of Hearing	:	**6th June 2014 at The Court House, Great Oaks, Basildon, Essex SS14 1EH**

DECISION

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1. The Applicant is granted dispensation from the consultation requirements in respect of works to replace the entrance lobby screens and door, and the replacement of elevated panels to the stairway plus associated works in each case at the property **upon condition** that the Respondent lessees are not charged for any of the legal and other costs of the Applicant of and occasioned by this application.

Reasons

Introduction

2. This application has been made for dispensation from the consultation requirements in respect of 'qualifying works'. The Applicant served a section 20 (of the 1985 Act) notice on the 18th November 2011 indicating a desire to undertake works as to 'replacement of lobby screens, door & associated works' at an estimated cost of £712 and 'replacement of elevated panels to stairway, associated works &

required staging for access' at an estimated cost of £925, making a total of £1,637. This notice was defective in that it did not disclose other estimates obtained and did not ask for comments. It just said that the cost would be added to the service charge account.

3. In fact, Heidi Carter from 17 Ballards Walk did make her views known to the Applicant in some detail by e-mail. She was concerned about the standard of workmanship, the materials being used and the fact that the works seem to have been temporary. For example she refers to a number of areas where there is 'mould/mildew growing' particularly on some of the new timber. She exhibits a number of e-mails with the council at the time pointing out problems. She challenges both the materials being used and the standard of workmanship.

4. On the 7th August 2013 an invoice was sent to Ms. Carter requesting £1,586.85 but this was subsequently reduced to £1,503.27 for the reasons set out in a letter of the 24th October 2013. This is less than the figure anticipated.

The Law

5. Section 20 of the 1985 Act limits the amount which lessees can be charged for major works 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 Schedules 2 & 3 to the **Service Charges (Consultation Requirements) (England) Regulations 2003**. These require a fairly complicated and time consuming consultation process which gives the lessees an opportunity to be told exactly what is going on, to make observations, and the landlord must give its response to those observations and take them into account.

6. 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.

Inspection

7. The Tribunal inspected the building in the presence of Craig Vickers of counsel, Clint Borley, the witness from the Applicant and Heidi Carter from number 17. There were other officials from the Applicant council in attendance. It was a bright, sunny morning.

8. The building is, in effect, a 4 storey block built on 'stilts' next to a small shopping arcade. The Tribunal was told that there are 9 long leaseholders and 5 council tenants in the maisonettes contained in the building which appeared to have been built in the 1950's of brick construction under a flat roof. The members of the Tribunal were shown the work to the entrance door and glass surround which had been prompted by failure to comply with fire regulations. It was also the subject of vandalism which the parties seemed to accept had been reduced following the work.

9. The members of the Tribunal had noted that there was a stairwell towards one end of the building and at that point, from 1st floor level to the top of the building, were white wooden slatted panels which seemed to be a safety barrier to prevent people falling from the landings. On one side of the building those panels also had wired, strengthened glass panels from floor to ceiling.

10. Ms. Carter pointed out that those glass panels were letting in water on at least one level. Mr. Borley said that he would immediately instruct someone to look at this, fix the problem, and replace any wood affected by rotting because of this at no expense to the lessees.

The Hearing

11. The hearing was attended by those who had attended the inspection plus Mr. Kijanczuk from number 11. Mr. Vickers explained that the original intention was to ask their long term contractor, Anglia Windows, to do the planned work but they apparently decided to sub-contract some of the work. The Applicant council therefore decided to obtain estimates from those sub-contractors to see if the work could be undertaken cheaper, which proved to be the case. Accordingly, there was some doubt about whether Schedule 2 or Schedule 3 of the regulations applied. The Applicant failed to supply copies of the estimates to the lessees at the time which is in breach of the regulations.

12. It was pointed out to Mr. Vickers that not only that but there had been no request for observations from the lessees. This proved to be relevant because Ms. Carter said that the way she thought she had been prejudiced was that she would have suggested that a more modern material than wood could have been used to avoid future maintenance which would involve expensive scaffolding. Mr. Borley said that the council had considered that anyway and the estimated cost to do this would have been an extra £20,000 compared with the cost of future maintenance every 7/8 years. The choice the council made was, in his view, more cost effective.

13. Mr. Kijanczuk was asked whether he had any comment to make but there was nothing he wished to say to add to Ms. Carter's comments.

14. Mr. Vickers was asked whether he had considered any condition which the Tribunal may wish to make if it were to grant dispensation such as an order that the lessees should not have to pay the costs of the application. He responded by saying that the Applicant would have to bear the cost of making the original application but the cost of the hearing should be recoverable as a service charge because the opposition to the application was misconceived.

Conclusions

15. 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 issues to be determined by a Tribunal dealing with this sort of case which culminated with the recent Supreme Court decision of **Daejan**

Investments Ltd. v Benson [2013] UKSC 14. Ms. Carter refers to one of the decisions of the lower courts in her e-mail to the Applicant of the 1st November 2013 when she purports to quote from an article written by a solicitor. As the Tribunal chair pointed out to Ms. Carter, the Supreme Court had now made a decision which changed the law and the test is now different to that set out in this e-mail.

16. The decision makes it clear that a Tribunal is only really concerned with any actual prejudice which may have been suffered by the lessees. In this case, for example, the prejudice suffered by the lessees was, so far as Ms. Carter was concerned, her lack of an opportunity to submit observations as to the materials to be used for the wooden slatted panels. Her other observations were about the reasonableness of the actual work undertaken which were not relevant to this application.

17. The difficulty with Ms. Carter's point is that there is only a requirement, on consultation, to take the observations of lessees into account. The evidence was that the Applicant had actually considered the point and had made its decision as a result of that consideration i.e. to use wood, as it was still more cost effective than, for example, aluminium. If the decision of the council was wrong, then because the council had already considered the point, that then goes to the reasonableness of the work, not the failure to consult properly.

18. There is no evidence that the full consultation process would have resulted in different works or a significantly lower cost. The Tribunal therefore finds that there has been little or no prejudice to the lessee from the lack of consultation. Dispensation is therefore granted.

19. However, there was a failure to consult and it is clear that the costs of making the application itself should be paid by the council and not the lessees. As to the costs of the hearing, the Tribunal is not convinced that the lessees should have to pay these either. This is an area of law which has changed substantially as a result of the **Daejan** decision in the Supreme Court. Ms. Carter was able to put forward a legitimate argument about prejudice because she had wanted to argue that a more durable material than wood should have been used.

20. The Tribunal was not convinced that the cost differential between wood and aluminium, for example, was as great as Mr. Borley suggested. After all, the labour costs should have been less because of the lack of need to paint. The wooden slatted panels are quite high and exposed which means that the period between re-painting is likely to be less than the 7/8 years suggested by Mr. Borley.

21. That the council had considered this and had even obtained figures was not clear before the hearing. The fact is that applications to this Tribunal are part of a 'no costs' regime. Ms. Carter had an argument to put forward and just because that argument did not succeed does not mean that she or the other lessees should have to pick up the costs of the Applicant. The application would not have been necessary if the Applicant had complied with its obligations.

22. Put another way, it is not acceptable, in this Tribunal's view, for someone to have to pay costs because she has chosen to exercise her Article 6 right to have a hearing when she clearly had an arguable point to put forward to a Tribunal where costs do not, as a rule, 'follow the event'.

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Bruce Edgington
Regional Judge
11th June 2014