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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AW/LDC/2014/0147 and 0148
Property	:	44 and 46 Pont Street, London SW1X 0AD
Applicant	:	Wellcome Trust Limited as trustees of the Wellcome Trust
Representative	:	Knight Frank LLP
Respondents	:	The 5 lessees for No.44 and 8 lessees for No.46 who are specified in the Schedules annexed to the application
Type of Application	:	Dispensation with Consultation Requirements
Tribunal Members	:	Judge Robert Latham Mr Chris Gowman MCIEH Mr Clifford Piarroux
Date and venue of Hearing	:	25 February 2015 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	13 March 2015

DECISION

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(1) The Tribunal determines to allow this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal

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proceedings incurred after 5 December 2014 may be passed to the lessees through any service charge.

Introduction

1. By two applications dated 29 October 2014, the Applicant seeks dispensation with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 ("the Act"). The applications involve 5 leaseholders at No.44 and 8 leaseholders at No.46 Pont Street, London, SW1X 0AD. The Tribunal has determined that these two applications should be consolidated and heard together.

2. On 13 November 2014, the Tribunal gave directions allocating the case to the paper track, but with the right of any party to request a hearing. Upon receipt of the Directions, which were sent to the landlord on 14 November, the landlord was required to send a copy of the Directions and the application to each leaseholder. By no later than 5 December, the leaseholders were to complete and return a pro forma questionnaire indicating whether they consented to or opposed the application for dispensation.

3. On 10 December, Frank Knight, the landlord's managing agent, informed the Tribunal that there had been an error in their post room. As a consequence, they had only been able to notify the leaseholders of the application by letters dated 10 December. The deadline for the leaseholders to complete the questionnaire had now passed. No alternative timetable was sought to enable the application to be fairly determined. Mr Coddington added that he would be on annual leave from 17 December to 5 January.

4. On 26 January 2015, this matter was listed before the Tribunal for a paper determination. Having perused the materials which had been filed by the parties, the Tribunal concluded that it was unable to fairly determine the matter of the papers before it because of Frank Knight's failure to comply with the timetable specified in the Directions. The Tribunal therefore had no option but to issue further directions. The alternative would have been to dismiss the application which would have restricted the landlord to claiming a maximum of £250 against each of the 13 tenants in respect of works, the cost of which exceed £20,000. The Tribunal indicated that it did not currently consider that the tenants should pay any costs occasioned by the landlord's failure to comply with the Directions. The Tribunal indicated that it was minded to make an order to this effect, subject to any written representations from the landlord.

The Law

5. The Consultation procedures required by Section 20 of the Act are complex. If they are to be followed, they will delay works by significantly more that the 60 days required by Stages 1 and 3. In the current case, they are to be found in the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003 No.1987) ("the Regulations"). The relevant provisions are set out in Part 2 of Schedule 4 ("Consultation Requirements for Qualifying Works for which Public Notice is not Required").

6. These requirements have been helpfully summarised by Lord Neuberger in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 at [12]:

   Stage 1: Notice of intention to do the works

   Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.

   Stage 2: Estimates

   The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

   Stage 3: Notices about estimates

   The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.

   Stage 4: Notification of reasons

   Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

7. Section 20ZA(1) of the Act provides:

   > "Where an application is made to the appropriate 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."

8. Where an application is made for dispensation in advance of the execution of any works, the only issue for this Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. Such an application will not concern the issue of whether any service charge costs will be reasonable or payable. This can only be determined after the works have been completed and the tenants have been notified of the sums that they have been required to pay.

9. In *Daejan*, the Supreme Court gave clear guidance on how the consultation provisions should be applied:

(i) the purpose of a landlord's obligation to consult tenants in advance of qualifying works is to ensure that tenants are protected from paying for inappropriate works or from paying more than would be appropriate;

(ii) adherence to those requirements was not an end in itself, nor are the dispensing jurisdiction under section 20ZA(1) a punitive or exemplary exercise;

(iii) on a landlord's application for dispensation, the question for the tribunal is the extent, if any, to which any tenant might be/has been prejudiced by the landlord's failure to comply;

(iv) neither the gravity of the landlord's failure to comply nor the degree of its culpability nor its nature nor the financial consequences for the landlord of failure to obtain dispensation is a relevant consideration;

(v) the tribunal can grant a dispensation on such terms as it thinks fit, provided that they are appropriate in their nature and effect, including terms as to costs;

(vi) the factual burden lies on the tenant to identify any prejudice which he claimed he would not have suffered had the consultation requirements been fully complied with but would suffer if an unconditional dispensation were granted;

(vii) once a credible case for prejudice has been shown the tribunal must look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice;

(viii) where the extent, quality and cost of the works are unaffected by the landlord's failure to comply with the consultation requirements an unconditional dispensation should normally be granted.

The Background

10. In its application, the Applicant describes how works to the external walkways were discovered when undertaking external decorations. Scaffolding had been erected to facilitate these works. Once the scaffolding was erected, a structural engineer was able to inspect the roofs. He found that a number of repair and replacement works were required to bring the walkways up to current health and safety standards. The walkways were decommissioned pending the completion of the necessary works. The external decorations were due to be completed on 31 October and the scaffolding dismantled on 3 November. As the scaffolding was in place, the landlord took an informed decision to carry out the further works that had been found to be necessary. Had the normal consultation procedures been followed, it would have been necessary to dismantle and re-erect the scaffolding. The landlord considered the cost of this to be disproportionate. Further, the works were urgent, as safe access was required for on-going maintenance to the water tank and TV aerials.

11. The sequence of events has now become clearer. On 1 July 2014, the landlord obtained a Fire Risk Report form BB7 who are fire risk specialists. BB7 did not inspect the walkways on the roof and the assessor was satisfied that the internal common parts provided adequate means of escape. On 11 September, Mr Hepher, a structural engineer with Beers, inspected the roofs. On 29 September, he provided his report to the landlord. He identified that the external staircases were in a state of substantial disrepair with severe corrosion to the iron work. On 9 October, BB7 completed a further fire assessment. However, they again obtained no access to the roofs. On 29 October, the landlord notified the tenants of the works that were to be executed to the external walkways which would utilise the scaffolding that was still in place. Reference was made to the structural survey that had been obtained. On the same day, the landlord made the current application to the Tribunal. On 15 December, a schedule of works to fire escapes, walkways, staircases and tank access was prepared and these works were put in hand.

12. Pursuant to the Directions given by the Tribunal, three tenants have responded:

    (i) Flat D, 44 Pont Street: On 15 December, Paul Isolani-Smyth completed a pro forma stating that he agreed to the application for dispensation.

    (ii) Flat 8, 46 Pont Street: On 18 December, Oliver Walker completed the questionnaire stating that he was opposing the application. He stated that he was content for the matter to be determined on the papers. On 28 December, he set out details of his grounds. Mr Walker complains that it was not necessary for

the landlord to apply for dispensation. The need for works to the walk ways had been identified in July or August. He had sought details of the proposed works, but these had not been provided. Had he been notified of what was proposed, he would have objected. Three existing ladders have now been removed and only one has been replaced. The only means of access to the roof is now via his flat. More importantly, the pre-existing ladders offered alternative means of escape. He would have objected strongly to the reduction in fire safety. He further complains about the cost of the works and the manner in which they have been apportioned between Nos. 44 and 46.

(iii) Flat E, 44 Pont Street: On 16 December, John Gate completed the questionnaire stating that he opposed the application. On 22 December, the Tribunal wrote to Mr Gant seeking clarification as to whether he was requesting an oral hearing. On 6 January, he informed the Tribunal that he no longer required an oral hearing and that he would be abroad between 16 January and 6 February. He opposed the application on the grounds raised by Mr Walker, namely (i) the lack of fire escapes; (ii) the apparently arbitrary manner in which £4,000 had been transferred from the account from 46 to 44 Pont Street; and (iii) the lack of management of the contract.

13. On 3 February, the landlord filed an Additional Statement addressing points raised by the tenants. The landlord has also filed a further Fire Safety Assessment form from BB7, dated 2 February 2015. BB7 have confirmed that the internal common parts provide adequate means of escape. BB7 inspected Mr Walker's flat and were satisfied that it has adequate means of escape. BB7 confirmed that three ladders have now been removed from the roof. They inspected the ladder which has now been replaced on the upper floor of Flat 8. The landlord accepts that the sole means of access to the roof at 46 Pont Street is now through Flat 8. However, the landlord states that access to the roof of No.46 will only be required for six monthly testing of the water storage tank and for ad-hoc repairs.

14. Mr Gait and Mr Walker have made further written representation to the Tribunal. Mr Walker (10 February) complains that the landlord did not obtain specialist advice before the ladders were removed, as Mr Hepher had recommended. No written advice was obtained in writing. Frank Knight states that BB7 have undertaken fire risk assessments on over 80 similar buildings within the Welcome Trust's South Kensington Estate over the previous 10 months. They had given previous advice in respect of external walkways and secondary means of escape. Frank Knight acted on verbal advice from BB7 and from their own knowledge.

15. The significant issue is that adequacy of the means of escape has now been confirmed. Mr Walker states that had he known through the

consultation that his flat would become the main route to the roof and that the external fixed ladder would be removed, he might have negotiated the use of the ladder at his own risk and/or offered to pay for the refurbishment himself. He suggests that the Tribunal should grant dispensation on terms. However, he does not suggest what terms might be appropriate.

16. On 20 February, the landlord filed a statement in reply as permitted by the Directions. This addresses the points raised by Mr Gait and Mr Walker. On 22 February, Mr Oliver submitted further representations. These do not add anything significant to the previous representations that he had made. Strictly, these further representations were not permitted by the directions. They have not affected the decision that we have reached.

The Tribunal's Determination

17. The only issue for this Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. This application does not concern the issue of whether any service charge costs will be reasonable or payable. The landlord states that it has yet to draw up a final costed schedule of works. This is still open and is being finalised by the landlord's building surveyor. Criticism is made that the additional works should have identified at an earlier stage and that had this been done, the cost of the works would have been less. There is also an issue as to how the landlord had indicated that it is minded to allocate the cost of the works between the two blocks. These are not issues for this Tribunal to determine on the basis of the current application.

18. Complaint is further made about the inadequate management and the manner in which the consultation process has been handled. The tribunal has expressed its concern at the landlord's failure to comply with the Directions given by this tribunal. The tribunal has ensured that the tenants are not prejudiced by this breach through the order that it is making under Section 20C of the Act.

19. The Tribunal addresses the further issues that have been raised:

    (i) The tenant's argue that it was not necessary for the landlord to apply for dispensation. The Tribunal are satisfied that the landlord only became aware of the need of these works when Mr Hepher inspected the roof area on 11 September 2014. Whether the landlord should have known of the need for the work at an earlier stage, is not a matter for this Tribunal on this application. Mr Gait asserts that the corrosion and cracking was clearly visible as is apparent from the photos. The landlord states that when the original specification was drawn up, the surveyor who inspected the building was not able to access the walkways. A

provisional sum was therefore included in the specification which proved to be insufficient when the walkways were inspected. Having learnt of the need for the works, it made practical sense for the works to be put in hand whilst the scaffolding was in situ.

(ii) The tenants complain of the reduction in fire safety. The Tribunal is satisfied that there are now adequate means of escape. Had the landlord gone through the consultation process, the Tribunal is satisfied that the same decision would have been reached. To have repaired the ladders would merely have increased the costs passed on to the tenants through the service charge. Had the ladders been replaced, they would only have been deemed safe for use by competent contractors.

(iii) Mr Walker complains that the sole means of access to the roof at No. 46 is now only through his flat. However, he seems to accept that access will only be required for the six monthly testing of the communal storage tanks and for ad-hoc repairs. The force of his criticism now is the reduction in fire safety. He suggests that he might have been willing to pay for the refurbishment himself to avoid this. However, the Tribunal are satisfied that his concerns are not justified and that the building now has adequate means of escape in case of fire. Further, the Tribunal accepts the landlord's further argument that the ladder was demised to it, and it would therefore owe a duty of care to anyone who used the ladder.

(iv) The tenants suggest that they may have been overcharged as a result of the works not being put out to tender. The landlord responds that the iron works were sub-contracted and put to tender. The remaining works have been costed at the same rates as the original project which had been tendered pursuant to the full Section 20 Consultation procedures. The tenants had not engaged with this earlier consultation. The landlord concludes that the decision to proceed with the works whist the scaffolding was in place, saved the tenants a great deal of money.

20. The final issue is the additional costs that the landlord has occasioned as a result of its failure to comply with the Directions given by the Tribunal on 13 November. The landlord should have notified the tenants of the application by no later than 5 December 2014. The landlord failed to do so. The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings incurred after 5 December 2014 may be passed to the lessees through any service charge.

Robert Latham
Tribunal Judge

13 March 2015