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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UJ/LDC/2017/0002**
Properties	:	**Baileys Court, Red Lion Street, Harlow, CM17 9BT**
Applicant	:	**Baileys Court Management Co. Ltd.**
Respondents	:	**Mrs. T.C. Kirby (36) Sally Manton (38) Mr. Hunt (40) Rachel Griffiths (42) John Richard Dongworth (44) Mr. Matunge (46) Mr. T & Mrs. E Ahmet (48 & 50) Mr. S. Hann (52) Joyce Tyler (54) Mrs. A. Vasiniuc & I Rossi (56) Mrs. C.R.G. Bath (58)**
Date of Application	:	**18th January 2017**
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**

DECISION

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1. The Applicant is granted dispensation from further consultation requirements in respect of works to dismantle and remove a collapsing boundary wall in the grounds of the property and replace with a fence.

Reasons

Introduction

2. On the 20th May 2016, the Applicant's managing agent instructed Earl Kendrick Associates to inspect a boundary wall and also a cracked flank wall of the property itself and advise. Martin Barsley MRICS MBIFM

AaPS inspected on the 21st June 2016. His report, dated 22nd June 2016, has been seen by the Tribunal.

3. Mr. Barsley came to the view that the cracking to the flank wall was not of structural significance and could be dealt with over time in future external works. However, as far as the boundary wall was concerned he said that it "*is in a poor condition due to the poor nature of construction and will need to be replaced*".

4. Later in the report, he described how the wall had a significant crack about half way along and from there it was found "*to be leaning significantly towards the garden of 96 Potters Field*". The occupier of 96 Potters Field was unable to open his garden gate. He adds "*at the present time, the wall appears to remain stable*". Having said that, Mr. Barsley reports that there is concern amongst residents that the wall may become unstable.

5. On the 23rd September 2016, the managing agents commenced the consultation process under section 20 of the 1985 Act. They gave notice to the Respondents that the Applicant was proposing to replace the wall with a fence. Comments and nominations for contractors were invited.

6. This application is dated 18th January 2017 and states that security fencing has been placed around the wall and the works 'are required urgently'. It subsequently transpired that the work had been finished some 2 months beforehand. No explanation is given as to what has changed or why the section 20 process was not continued to its conclusion. The application asked for dispensation from the consultation requirements and said that the application could be dealt with without a hearing. The Tribunal had serious concerns about this and ordered a hearing which was due to take place on the 15th March.

7. The Applicant was ordered to file and serve a statement setting out a history of the matter giving its reasons for suggesting that there was a need to dispense bearing in mind that the report from Earl Kendrick Associates was dated 22nd June 2016 and the first letter to leaseholders was dated 23rd September 2016. The Applicant was also asked to attach copies of all quotations obtained.

8. A week before the hearing, the Tribunal chair instructed the office to contact the managing agents to find out why no statement had been filed and served. The person dealing with the matter was not there but assistance was given by another member of staff. He claimed that the agents had no idea that a directions order had been made. That was patently incorrect as the letter sending the directions order had also asked for a fee to be paid which was in fact paid at the time.

9. A statement was then prepared and dated 8th March 2017. The required information was not given in this statement and there were no attached quotations. However, it stated that the Applicant is a residential management company and the directors are the Respondents. They made the decision to proceed with the works which were completed on the 21st November 2016.

10. After careful consideration of all the information available and bearing in mind (a) that the Tribunal could not see the state of the wall as it had already been removed and (b) there had been no response to the application from any of the Respondents, it was determined that the hearing would be cancelled in order to save public expense and the Respondents were notified. The managing agents had already agreed to the matter being dealt with without an oral hearing.

The Law

11. 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 Schedule 4, Part 2 to the **Service Charges (Consultation Requirements) (England) Regulations 2003**. These require a Notice of Intention, facility for inspection of documents, a duty to have regard to tenants' observations, followed by a detailed preparation of the landlord's proposals.

12. The landlord's proposals, which should include the observations of tenants, and the amount of the estimated expenditure, then have to be given in writing to each tenant and to any recognised tenant's association. Again there is a duty to have regard to observations in relation to the proposals, to consider seeking estimates from any contractor nominated by or on behalf of tenants and the landlord must give its response to those observations.

13. 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.

Conclusions

14. 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 matters to be considered by a Tribunal dealing with this issue which culminated with the Supreme Court decision of **Daejan Investments Ltd. v Benson** [2013] UKSC 14.

15. That decision made it clear that a Tribunal is only really concerned with any actual prejudice which may have been suffered by the lessees or, perhaps put another way, what would they have done in the circumstances?

16. This is not an application for the Tribunal to approve the reasonableness of the works or the reasonableness or payability of the service charge demand arising from the work. The reasonableness of the cost can still be challenged.

17. As far as this application is concerned, the **Daejan** case referred to above now places the responsibility on the shoulders of the long leaseholders to establish a particular prejudice arising from a lack of

consultation. None has been put forward.

18. The Tribunal has been very concerned about the behaviour of the Applicant and/or the managing agent. There is no evidence to suggest that either these works were too urgent to have proper consultation or that the leaseholders have had the benefit of a proper bidding process between contractors. There are 11 Respondents and consultation is only required if the cost is more than £250 per flat which presumably means that the cost of removing the wall and erecting a fence was more than £2,750.00. Whether this is a reasonable cost is impossible to say with the limited information available to the Tribunal.

19. If the Respondents had not been directors of the Applicant and if there had been the hint of prejudice, this application would have been refused. On the information presented, there appears to have been a clear breach of the consultation regulations bearing in mind that the problem was discovered in June 2016 when the expert said it was not urgent. 3 months later, consultation started and the work was not done for another 2 months. Nearly 2 months after that, this application was made and it contained what appears to be misleading information.

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Bruce Edgington
Regional Judge
15th March 2017

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.