12705

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

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| Case Reference : | CHI/00MS/LDC/2017/0052 |
| Property : | Elmfield North & West, 24 Millbrook Road East, Southampton. SO15 1JA |
| Applicant : | St Sampsons Finance Limited |
| Representative : | Mr Sam Madge-Wyld |
| Respondent : | Various leaseholders |
| Representative : | Mr Philip Mercer |
| Type of Application: | Application under Section 20ZA Landlord and Tenant Act 1985 ("the 1985 Act") for dispensation from consultation requirements |
| Tribunal Members : | Judge P J Barber<br>Mr P D Turner-Powell FRICS Valuer Member |
| Hearing Venue: | Court 4, Havant Justice Centre, Elmleigh Road, Havant, Hampshire. PO9 2AL |
| Date of Hearing: | 22nd January 2018 |
| Date of Decision : | 7th February 2018 |

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## DECISION

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## Decision

1. The Tribunal determines in accordance with the provisions of Section 20ZA of the Landlord and Tenant Act 1985 ("the Act"), that dispensation be granted from all the consultation requirements of Section 20 of the Act in respect of the following work related to asbestos removal:

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| £10,500.00 & VAT | North Block Stores |
| £25,500.00 & VAT | Garage & Shafts – North Block |
| £24,750.00 & VAT | Garage & Shafts – West Block |
| £1,750.00 & VAT | Welfare |
| £10,045.00 & VAT | Generator |
| £3,700.00 & VAT | Osmer Building (Hampshire) Limited |
| £2,620.00 & VAT | Osmer Building (Hampshire) Limited |
| £1,080.00 & VAT | Osmer Building (Hampshire) Limited |

2. The Tribunal makes no determination on whether the above charges are reasonable or payable.

3. The Tribunal further determines that as a condition of granting dispensation, the Applicant landlord shall be responsible for its own costs in these proceedings and that it shall also reimburse the Respondent tenants` costs in the sum of £2,010.00.

## Reasons

### BACKGROUND

1. This is an application dated 24th July 2017 and filed by St Sampsons Finance Limited pursuant to Section 20ZA of the 1985 Act in relation to Elmfield North & West, 24 Millbrook Road East, Southampton SO15 1JA ("the Property") to dispense with the consultation requirements contained in Section 20 of the Act.
2. The application describes the Property as a converted mansion comprising 57 flats in two separate blocks linked by a corridor.
3. The application refers to certain works already carried out at the Property relating to asbestos removal; an application for determination of reasonableness of the service charges in relation to the same works was made in 2016 and separately determined under Case Ref. No. CHI/00MS/LSC/2016/0075.
4. Directions were issued in the matter on 4th August 2017 and 13th September 2017. The Applicant indicated in the application that it would be content with a paper determination in the matter; however as a result of submission by one of the tenants, the matter was to be determined following an oral hearing.

5. The evidential bundle of documents provided to the Tribunal in the matter included copies of the application, the directions, a sample copy Lease dated 31st May 1991 in relation to Flat No. 7 Elmfield North, reports, Section 20 documents and various correspondence; the bundle also includes the Applicant`s statement of case dated 9th October 2017, the Respondents` statement of case dated 22nd October 2017 and a reply on behalf of the Applicant, submitted late and dated 8th January 2018.

## INSPECTION

6. The Tribunal inspected the Property prior to the hearing, in the presence of Ms Gail Drysdale on behalf of the Applicant, and Mr Mercer, Miss Gray and Mrs Saunders, of the Respondents. Elmfield North & West form two residential blocks, each being under a partly pitched, and partly flat roof and arranged over several storeys in a "V" shape and each being connected to a separate "Link House" building, via single storey corridors; the Link House has previously had commercial occupants but is now vacant.

7. The Tribunal inspected the basement garage area of Elmfield North block, noting various pipes in respect of which the previous asbestos lagging had been removed; work appeared to be still in progress in respect of certain of the vertical shafts and for that reason the basement garage areas have remained locked and unused. No inspection took place of the corresponding basement garage area of Elmfield West, on the basis that the Tribunal was advised that it is broadly similar to the garage area below Elmfield North. The Tribunal also inspected the basement area below the Link House, where the boilers providing hot water and heating for the residential blocks, are located.

## THE LAW

8. Where a landlord intends to carry out major works, the cost of which will be borne by the service charge payers, Section 20 of the 1985 Act requires that the landlord shall first either go through a prescribed consultation process with the tenants concerned, or alternatively obtain a determination from the Tribunal that it may dispense with those procedures. If it fails to do so, the amount it may recover from each service charge payer towards the cost of the works in question is limited. The detailed consultation requirements are set out in Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations S.I. 2003 No.1987 and such regulations require a notice of intention to carry out works to be served on the tenants, facilities for inspection of the documents to be given, a duty to have regard to tenants` observations, followed by the preparation of a detailed statement of the landlord`s proposal and a further opportunity for the tenants to comment.

9. Section 20ZA of the Act allows the Tribunal to dispense with some or all of these requirements if it is satisfied that it is reasonable to do so.

## REPRESENTATIONS

10. Mr Madge-Wyld of counsel attended the hearing to represent the Applicant; also in attendance for the Applicant were Ms Drysdale, Ms Lacey-Payne of the managing agents, Napier Management Services Limited ("Napier") and the Applicant`s solicitor, Mr Newbury. Mr Mercer attended to represent the Respondent lessees accompanied by a number of other lessees, being Miss Gray, Mrs Saunders and Mr Scott. There was also an observer present.

11. The Tribunal outlined the application at the outset and Mr Madge-Wyld referred to the works in respect of which his client sought dispensation from the consultation regulations. Mr Madge-Wyld also handed to the Tribunal a further copy of the decision in *Daejan Investments Limited v Benson [2013] UKSC 14*, and also a supplementary bundle containing the statement of Ms Drysdale dated 8th January 2018 and related documents. Mr Mercer confirmed that he had also received a copy of the supplementary bundle.

12. Mr Madge-Wyld said that he proposed to call Ms Drysdale and referred to the fact that the Respondents had not put in any formal evidence as such; the Tribunal indicated that it would not require evidence to be given formally under oath. Mr Madge-Wyld submitted in opening, that there are two issues:

    (1) whether dispensation should be granted at all?

    (2) If dispensation is granted, should it be on terms?

    Mr Madge-Wyld said the test is set out in *Daejan v Benson* at Page 861 paragraph 25 and he referred also to paragraph 45, in which the Supreme Court had said it would be hard to see why dispensation should not be granted in the absence of some very good reason. Mr Madge-Wyld said that prejudice would be manifest in the event of the relevant works being inappropriate or if the landlord paid more than was appropriate for the works; he added that as a result of *Daejan v Benson*, the nature of any failure to consult is largely irrelevant and that it was common ground in this case, that the works were needed. Mr Madge-Wyld further submitted that if the Tribunal does agree dispensation, then the second question arises regarding any terms, and he added that the Tribunal may only impose terms, including any in relation to costs, where prejudice is established.

13. Mr Madge-Wyld called Ms Drysdale who referred to her statement dated 8th January 2018. Mr Mercer asked Ms Drysdale to confirm the relationship between the two residential blocks, and the Link House; she indicated that the Link House is separately owned and that Napier do not maintain any part of the Link House, save for the basement boilers. Ms Drysdale further confirmed that the boilers located in the Link House basement, provide hot water and heating via connecting pipes through the basement garage areas of the residential blocks and then up to the individual flats above. Ms Drysdale was not sure whether the boilers also serve the Link House itself. Mr Mercer asked Ms Drysdale if Napier were instructed by the HSE to prepare an asbestos plan in relation to the Link House as well as Elmbridge North & West and she replied that that was quite possibly so. Mr Mercer said that the lessees are aggrieved that they are paying for works to private property which Napier should not have been maintaining within the service charge. Mr Madge-Wyld confirmed that the Applicant is not seeking dispensation in respect of the sum of £40,150.00 being the amount relating to asbestos removal for the Link House, as referred to in the letter from Merryhill Envirotec Limited ("Merryhill") dated 27th April 2017 at Page 304 of the bundle. Mr Mercer further submitted that the items in the Merryhill letter for "welfare" and "generator" should not be recoverable by the Applicant and he said, their purported inclusion is an example of financial prejudice to the lessees. Ms Drysdale said that Napier intend to issue relevant credits in due course in relation to service charges previously demanded but possibly no longer due, so as to ensure correct apportionment, in the light of the decision today.

14. Mr Madge-Wyld said the starting point in this matter is to consider whether the works were appropriate; he said there is no dispute that the works were unavoidable and he said that this was accepted by the Respondents in paragraph 55 of their statement, at Page 347 of the bundle. Mr Madge-Wyld referred to the HSE notification dated 2nd October 2015 at Page 309 of the bundle, relating to Link House; he added that Napier were instructed to ensure access to all areas, not just the Link House and that the asbestos removal was particularly urgent due to the fact that a new gas safety certificate was outstanding for the boilers, and that it was unsafe to access the basement boiler area owing to the presence of asbestos. Mr Madge-Wyld referred to an email dated 6th November 2015 at Page 465 of the bundle, which he said was an indication by the HSE that works to Elmfield North & West would be needed; reference was also made by him to the notice issued by Hampshire Fire & Rescue at Page 407 paragraph 10, making it clear that fire stopping works are needed to all areas as a matter of urgency. Mr Madge-Wyld referred to a Fire Enforcement Notice at Page 320 onwards, of the bundle, with a deadline specified of 1st April 2016 for compliance. Mr Madge-Wyld also referred to other notices in the bundle including those relating to required fire alarm works, the main fusebox for which is in the basement garage area.

15. Mr Madge-Wyld referred to the CASA Environmental Services Limited ("CASA") survey report dated 5th August 2015, at Page 140 of the bundle which he said made reference to the presence of asbestos not only in the Link House, but also in the North Block and the West Block; he said the report made it clear that there was asbestos which needed to be removed and that this was not in dispute.

16. Mr Madge-Wyld said that prejudice might be demonstrated if it could be shown that the cost of the work is higher as a result of the failure to consult; however he added that the Applicant says there is no evidence to such effect and added that the earlier quotes referred to by the lessees, are not like for like, since they were informed by a different and earlier survey, requiring less work. Mr Madge-Wyld said it was not until the CASA survey dated 5th August 2015 that the full scope of the work needed, had emerged, and on which the Merryhill quote dated 13th October 2015 at Page 260 of the bundle, is based. Mr Madge-Wyld added that the other quotes obtained earlier, referred to at Page 246 of the bundle, related to the aborted Section 20 consultation exercise, adding that in any event, Merryhill were the cheapest of the earlier quotes for the work then envisaged. Mr Madge-Wyld distinguished the CASA report works, from those identified in the earlier Shield Environmental Services Ltd ("Sheild") Report dated 25th September 2014 at Page 411 of the bundle; the former, he said had called for more work than the latter. Mr Madge-Wyld said that since Merryhill had provided the lowest quote for the earlier intended works, it was likely that the other tenderers would have been more costly in regard to the increased work required by the CASA survey; he added that there is no evidence that the work carried out was of a poor standard and that historic neglect had not been found in the earlier proceedings under Section 27A Ref CHI/00MS/LSC/2016/0075. Accordingly Mr Madge-Wyld said there is simply no evidence of prejudice and that consequently, dispensation should be allowed; he added that there had also been urgency in the matter and that the landlord had no real choice but to proceed with the work given the possibility of an HSE prosecution and the pressing issue of the separately required fire alarm installation work, which necessitated prior removal of the asbestos.

17. In regard to other points raised by the Respondents, Mr Madge-Wyld said that their concern about a previous Section 20 consultation exercise having been aborted, was not greatly relevant, adding that as a result of *Daejan v Benson*, consultation should not be seen as an end in itself, and that the focus must be on whether or not any prejudice has arisen in relation to whether the work was needed and/or whether the costs have become higher due to failure to consult. Mr Madge-Wyld said that the Applicant accepts the Respondents` complaints about the inconvenient timing of the work in winter time, but he said the HSE email at Page 465 of the bundle, shows how it was necessary, and added that it would have been worse still if the boiler had for example, broken down in winter. Mr Madge-Wyld said that Napier`s letter dated 29th September 2015 at Page 368 of the bundle, was evidence of a landlord response having been made to tenant observations, and that Ms Drysdale of Napier had been present at a tenant meeting to discuss matters, on 8th September 2015. Mr Madge-Wyld added that the points which had been raised by Mr Mercer as referred to at Page 376 of the bundle, were more about timing, than the works themselves. In regard to any financial loss due to timing, Mr Madge-Wyld said there is no relevant prejudice, since the work had to be done, and that any claim by the lessees against the landlord for alleged breach of covenant, should have been pursued in the county court and is not linked to a failure to consult.

18. In regard to any terms or conditions which might be attached to an order for dispensation, Mr Madge-Wyld said that prejudice would also have to be first proved. In regard to costs, whilst Mr Madge-Wyld accepted that there is a low burden of proof to be crossed by the lessees, he said it is not appropriate to make any conditions to any order for dispensation, including as to costs, where there is no evidence on which to establish that the lessees have been prejudiced, adding that unless prejudice is established, dispensation should be granted unconditionally.

19. Mr Mercer opened by saying that the HSE letter at Page 309 of the bundle, related only to the boiler room in the Link House and that the urgency was self-inflicted by the landlord, in that the asbestos had been known about since 2006 and that it was only the intervention of the HSE which had prompted the landlord into action; he added that the works could have been addressed differently, and that heating would not have been an issue if the work had been done in the summer. Mr Mercer said that the landlord had failed to act in response to a fire report dating back to 2006 and similarly that the HSE had suggested the possibility of phased works in the final paragraph on Page 465 of the bundle. Mr Mercer said this meant that the works to the garage basement areas of the North & West blocks could have been done later. Mr Mercer further submitted that the gas safety certificate for the boilers had expired in May 2015 and that allowing it to lapse and then pleading that as a reason for urgency, should not have arisen. Mr Mercer further questioned whether the original Section 20Za application for dispensation was actually only limited to the works to the Link House and he handed a copy of such application to the Tribunal, which arranged for further copies to be made, including for Mr Madge-Wyld.

20. After a break in the proceedings for lunch, Mr Mercer reiterated that any urgency in regard to the asbestos removal was self-inflicted by the landlord; he further submitted that it was prejudicial for the landlord to have acted upon only one quote, being that from Merryhill, for the revised, fuller works required and arising

from the CASA report. Mr Mercer said that there was no evidence of other contractors having been approached by the landlord for quotes in regard to the CASA report and that it was a breach of stage 2 of the consultation requirements, for only one estimate to have been obtained and relied upon. Mr Mercer further submitted that Shield had been the cheapest of the original tenderers and he questioned why they had not been asked to quote alongside Merryhill. Mr Mercer said that before entering into a contract, the landlord was obliged to have regard to any tenant observations and he added that there had in reality been numerous observations made in respect of the earlier proposed works which would have remained of relevance in regard to the works as actually carried out. Mr Mercer further submitted in regard to "relevant prejudice" under *Daejan v Benson*, that prejudice had been caused to the tenants as a result of only one contractor having been approached and that there might have been cheaper quotes available.

21. Mr Mercer referred to the previous proceedings in relation to the tenants` Section 27A application, and said the Tribunal had concluded then that despite professional representation, the Applicant had not made any application for dispensation, and also that it could have approached both the HSE and the Fire Authority regarding possible phasing to make the works more manageable and/or for them to have been carried out in the summer when the impact on tenants would have been less. Mr Mercer also said that Note 1 to the costs breakdown sheet at Page 366 of the bundle, referred to a reduction if all the asbestos removal works were done together, pointing out that the lessees say that only the Link House work needed to be done up front, adding that Merryhill had been inappropriately incentivised to do all the work together, and not on a competitive tender basis. Mr Mercer further referred to inconsistencies regarding the Merryhill tender sum of £93,293.95 at Page 139 of the bundle, and the amount charged to the service charge being £112,694.96 as referred to in the Merryhill invoices at Pages 302/3 of the bundle. Mr Mercer said there was financial prejudice to the lessees as a result of the landlord submitting invoices to the service charge account otherwise than in accordance with costs which were already known. Mr Mercer also referred to the sum of £60,750.00 for asbestos removal costs as referred to in the earlier Section 27A Tribunal.

22. Mr Madge-Wyld said that whilst only one contractor was approached in respect of the works actually carried out, it is not possible on the evidence available to speculate regarding whether the costs incurred were greater, merely because only one quote was obtained. Mr Mercer said that Sheild had provided the lowest earlier quote and he added that the Respondents had not obtained a quote from them but could probably still do so. Mr Mercer added that had it not been for the earlier Section 27A challenge, the discrepancy arising regarding the need for costs to be apportioned as between the Link House and the North & West residential blocks, might never have come to light; he added that the landlord could have complied fully with the consultation requirements so as to ensure transparency, but had not done so. Mr Mercer further questioned the project management costs at Pages 306-308 of the bundle and also the generator, and welfare costs at Page 305 and as to why these have not been apportioned. Mr Madge-Wyld responded to the effect that no relevant prejudice arises from any failure to apportion the costs properly. Mr Mercer countered this by saying that the prejudice consisted of the landlord`s lack of initiative in dealing with problems at an earlier date, and in it not preparing a proper plan for asbestos removal some 10 years earlier when the problem was

first known about. Mr Mercer further submitted that there was prejudice as a result of the landlord: (a) charging garage rental at a time when the area was dangerous owing to asbestos (b) carrying out the works at the worst time of year (c) failing to explore any avenues for phasing or partially delaying the works, (d) causing some tenants to lose rental income from disgruntled sub-tenants who chose to leave due to the cold, and (e) breaching its covenant for quiet enjoyment. Mr Mercer also referred to the CASA report flowchart at Page 229 of the bundle, suggesting that it indicated a degradation over time, resulting in more costly eventual repair. Finally, Mr Mercer referred again to the landlord's failure to obtain more than one quote for the works actually carried out which he said, meant that the lessees could not assess accurately whether there might have been cheaper ways to do the work.

23. Mr Madge-Wyld asserted that the factual burden of proving prejudice is on the lessees and he added that they could for example, have obtained evidence from a surveyor to verify that the work could have been done at lower cost; he said that whilst the threshold is low, there is simply no evidence on this. Mr Madge-Wyld reiterated that there had been a competitive tendering process and that Merryhill had been the cheapest, adding that CASA had then identified the work actually needed and Merryhill had undertaken that work. Mr Madge-Wyld further submitted that his client had not made any appeal against either the HSE or Fire Authority notices, given that it had no grounds for appeal and in any event, he said, it would not have reduced the cost. Mr Madge-Wyld said that dispensation is sought for the relevant costs, and that it will be necessary later on to make an appropriate apportionment of those costs as between the Link House and the North & West blocks, but that dispensation is needed first; he added that dispensation is also sought for the project management costs at Pages 306-308 of the bundle. In the light of this, the Tribunal asked Mr Madge-Wyld to confirm the works to which this application relates and he confirmed specifically that they are as follows:-

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| £10,500.00 & VAT | North Block Stores |
| £25,500.00 & VAT | Garage & Shafts – North Block |
| £24,750.00 & VAT | Garage & Shafts – West Block |
| £1,750.00 & VAT | Welfare |
| £10,045.00 & VAT | Generator |
| £3,700.00 & VAT | Page 306 – Osmer Building (Hampshire) Limited |
| £2,620.00 & VAT | Page 307 – Osmer Building (Hampshire) Limited |
| £1,080.00 & VAT | Page 308 – Osmer Building (Hampshire) Limited |

In regard to the reference which had been made by Mr Mercer to the CASA flowchart and increased cost owing to degradation, Mr Madge-Wyld said that no finding of historic neglect had been made during the earlier Section 27A proceedings.

24. Neither Mr Mercer, nor Mr Madge-Wyld elected to make a closing statement on the basis that they had already made all the necessary submissions during the course of the day.

## CONSIDERATION

25. The Tribunal has considered and taken into account the documents and other evidence to which its attention has been drawn and also the submissions made on behalf of the parties.

26. The Tribunal notes the specific confirmation given by Mr Madge-Wyld that the application for dispensation relates only to those works as referred to in paragraph 23 of this decision. The Tribunal has some sympathy with the Respondent tenants in regard to the confused picture on the face of it, concerning the lack of apportionment to date as to costs of the works attributable respectively to the Link House and the North & West residential blocks. However the present application is concerned with whether or not dispensation should be granted, and in that regard as to whether the tenants would suffer any relevant prejudice in consequence; the properly chargeable costs being a separate issue. Accordingly it will in due course be for the Applicant to ensure that the proportion of costs attributed to the service charges represents a fair and proper, and accurate apportionment. The Tribunal notes the arguments as to prejudice put forward for the Respondents; however it concurs that issues such as breaches of landlord covenants and any consequential losses by tenants, are matters for the county court and are not relevant prejudice for the purpose of this application. The Tribunal considers it unfortunate that the Applicant saw fit to rely only on the single quote from Merryhill, when it came to carrying out the works, despite having obtained a range of quotes previously for the earlier proposed, but less extensive works. In regard to whether or not a cheaper quote could have been obtained by competitive re-tendering, the Tribunal notes that no clear or specific evidence has been provided and therefore the possibility of a lower quote is to some extent speculative; in any event the landlord would not have been obliged to accept any lower quote.

27. Mr Mercer pointed out that the landlord had known about the asbestos for a long time; however there is no clear and persuasive evidence that the work actually undertaken would have been cheaper if it had been done sooner. Similarly there is no evidence provided to verify that the cost would have been lower had the works been phased; indeed, note 1 to the cost breakdown sheet at Page 366 of the bundle, suggests to the contrary. Matters of inconvenience to the tenants, including loss of rental income, are a separate issue for which the tenants have separate remedies. In regard to the tenants` concern about costs being passed on inappropriately, the Tribunal notes and relies upon the assurances in respect of the same given by Ms Drysdale and Mr Madge-Wyld, and as referred to respectively in paragraphs 13 and 23 above, concerning appropriate apportionment.

28. The parties should note however, that the decision of the Tribunal in this matter is simply to allow dispensation, and not to approve the costs of the work concerned. Such costs were indeed disallowed in the earlier decision under reference CHI/00MS/LSC/2016/0075. Accordingly the Applicant may have to consider the options open to it in respect of the previous decision if it wishes to recover the costs of those works for which dispensation has been granted.

29. In regard to the possibility of imposing terms or conditions to the order for dispensation, the Tribunal has noted the comments made by Mr Madge-Wyld to the effect that an order as to the tenants` costs should not be allowed, in the absence of a finding of relevant prejudice. However, paragraph 61 in *Daejan v Benson*, makes it clear that the Tribunal is not precluded from imposing conditions

in regard to any grant of dispensation, including a term that the landlord pays the tenants` costs in resisting the landlord`s application; such condition may be a term on which the Tribunal grants the statutory indulgence of dispensation. In regard to the landlord`s costs in making this application, it would have been open to the landlord to make an application for dispensation much earlier and the Tribunal considers it would be unfair for the tenants to bear such costs in these circumstances. Similarly the Tribunal notes that the Respondent tenants identified costs which they had incurred in resisting the application, in a sum of £2,010.00, as referred to in paragraph 69 on Page 350 of the bundle. The Tribunal directs that as a condition of granting dispensation, the Applicant landlord shall be responsible for its own costs and also that it shall re-imburse to the Respondent tenants their identified costs of £2,010.00.

30. Accordingly the Tribunal so makes the determination set out above.

Judge P J Barber

Appeals :

1. 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.

2. 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.

3. 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.

4. 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.