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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KC/LDC/2013/0009**
Properties	:	**Flats 1-6, 12-15 and 19-24 Folders Gate Station Road Ampthill MK45 2UN**
Applicant	:	**Callisto Properties Ltd.**
Respondents	:	**Mr. & Mrs. A. Keen (No. 1)** **Mr. & Mrs. S. Bradley (No. 2)** **Mr. D. Foster (No. 3)** **Mr. M. Brighton (No. 4)** **Ms. R. Marlow (No. 5)** **Berkeley Square Investment Co. Ltd (No. 6)** **Mr. D.J. Edwards (No. 12)** **Mr. P. Couch (No. 14)** **Mr. N.S. Rance & Ms. A.C. Charlesworthy (No. 15)** **Mr. & Mrs. P.A. Charnley (No. 19)** **Mr. A. Carvell (No. 20)** **Mr. D. West (No. 21)** **Mr. & Mrs. S. Spranger (No. 22)** **Mr. S. Bhatt (No. 23) and** **Mr. S.J. Turney (No. 24)**
Date of Application	:	**10th May 2013**
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"))**

DECISION

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1. Callisto Properties Ltd. is substituted as Applicant in this case in place of OM Property Management Ltd.

2. The Applicant is granted dispensation from the consultation requirements in respect of works to the sewerage system serving the properties.

3. An order is made pursuant to Section 20C of the 1985 Act preventing the Applicant from recovering any part of its costs of representation before this Tribunal from the lessees as part of a service charge demand.

Reasons

Introduction

4. This application has been made by OM Property Management Ltd. for dispensation from the consultation requirements in respect of 'qualifying works' to the estate's sewerage system. The lessees 'relevant contribution' to qualifying works is "*the amount he may be required under the terms of his lease to contribute (by payment of service charges) to relevant costs incurred on carrying out the works*" (Section 20(2) of the 1985 Act).

5. The lessees have no contractual obligation to OM Property Management Ltd. to pay anything. The liability is to the landlord and it is therefore the landlord who needs the dispensation. In view of this, the first Order made by the Tribunal is to substitute the name of the landlord for OM Property Management Ltd as Applicant.

6. The evidence from Daniel Channon of OM Property Management Ltd. is that they started to manage this estate on 1st February 2009. The estate consists of 15 leasehold apartments and 8 freehold houses. All 23 properties pay towards the maintenance of the sewerage system. On the 4th February 2013 'the' pump for such system broke down. Because of this, according to Mr. Channon, the foul sewerage chamber had to be emptied "*every day or so*" at a cost of £800 plus VAT.

7. 2 quotes were obtained for rectification works which were from Lynx Maintenance Ltd. (£15,700 plus VAT) and Acorn Pressurisation Services Ltd. (£15,780.30 plus VAT). The lower of these estimates was accepted and the work undertaken between 11th and 15th March 2013.

8. There are then 2 relevant pieces of information which are missing from the papers i.e. whether the works were successful and why there was a delay of almost 2 months before making this application. One can only assume that there was at least some degree of success with the works as the lessees do not make any allegation of ongoing problems.

9. A procedural chair issued a directions order on the 15th May 2013 timetabling this case to its conclusion. One of the directions said that this case would be dealt with on the papers taking into account any written representations made by the parties on or after 14th June 2013. It was made clear that if any party wanted an oral hearing, then that would be arranged. No such request was received. The determination was delayed to enable further written representations to be made.

The Law

10. 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. The landlord's proposals, which should include the observations of tenants, and the amount of the estimated expenditure, then has 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 proposal, to seek estimates from any contractor nominated by or on behalf of tenants and the landlord must give its response to those observations.

11. 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.

The Lease terms

12. Copies of the leases to flats 1 and 12 were provided and the relevant terms were identical i.e. under clause 9.2.5 the landlord has to maintain, repair and replace as necessary all parts of the drainage system which do not form part of any property.

The Lessees' case

13. This application is opposed by all the lessees who responded to the application. There are detailed responses from David Edwards, Paul Couch, Elaine Keen and Nick and Claire Rance. They all deal with the same issue which is that this system has, allegedly, not been fit for purpose since, according to Mr. Edwards' statement, he took occupation of the first house. Unfortunately he does not say when this was but he does say that he moved in before any other properties were sold or occupied on this estate. In fact, he also appears to have been the original lessee of flat 12 under a lease for 125 years from the 31st March 2008.

14. The lessees produce a number of documents which, although they have greatly assisted the Tribunal in giving background information, they do not actually assist in determining this application. The lessees have said that they have been or are taking legal advice and it may have helped their case if they had received advice on what this application is and the limitations on the Tribunal's powers.

15. The documents do indeed show that there have been considerable problems with the sewerage system since at least 2009. There are several copy invoices from PIMS (Services) Ltd. and Dura Pump in 2009 and 2010 addressed to the managing agents for various call outs for blockages, repairing the pump and, in or about November 2009, replacing the pump.

Conclusions

16. Whilst the Tribunal can understand the frustration of the lessees in this matter, this is not an application to determine the reasonableness and payability of service charges. 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 issue which culminated with the recent Supreme Court decision of **Daejan Investments Ltd. v Benson** [2013] UKSC 14.

17. 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? In this case, for example, a total failure of the sewerage system involving the emptying of the main chamber frequently at considerable cost was the problem. Faced with that problem, the question then is what should have been done?

18. As the lessees do not suggest that the remedial works undertaken over 4 months ago have not resolved the problem, the Tribunal is in some difficulty in determining, even on the basis of the lessees' own case, that (a) the remedial works undertaken were not appropriate or (b) that they were not urgent. If it had been suggested that the works had not resolved the problem, the Tribunal may well have made this dispensation conditional upon the Applicant seeking the opinion of an independent expert to give a view as to whether the system as now repaired is fit for purpose.

19. The real problem exposed by the lessees in this case is the suitability of the sewerage system as installed by the developer and whether past and present service charges should be paid by them or the Applicant. The leases produced are not building leases. Presumably the original lessees, of whom Mr. Edwards was one, entered into a contract with the landlord whereby in consideration of the landlord erecting the flat and granting the lease, the lessee would pay the purchase price. It does seem extraordinary that so soon after the estate was built, 'the' pump has had to be replaced twice. 'The' is emphasised as there is some suggestion that 2 pumps should have been fitted.

20. This raises more questions than it answers but a natural inference from the facts as seen by the Tribunal is that there was a design or structural defect in the pumped sewer system in which case it is difficult to see why the lessees should be responsible for remedial works.

21. This is a problem which may have to be dealt with in the courts or in this Tribunal in a subsequent application. Whichever venue is involved, the judges are unlikely to be able to determine the issues without evidence from an independent expert. Apart from that, this Tribunal cannot really take matters further.

22. As far as this application is concerned, it is evident that remedial works were required and that the delay which would have been caused by undertaking the full consultation exercise would have resulted in substantial additional costs to the lessees in respect of tankering charges. There is no evidence that the full consultation process would have resulted in different works or a lower cost. The Tribunal

therefore finds that there has been no prejudice to the lessees from the lack of consultation. Dispensation is therefore granted.

23. As to the costs order sought by the Respondents, the Tribunal is very concerned to see the history of this sewerage system and that despite the fact that the Applicant's witness clearly knew about the history, he failed to mention it in his statement. The Tribunal is also concerned that this pump has had to be replaced twice in about 5 years and that no independent report seems to have been commissioned to find out why. It also appears that the managing agent did not take up an invitation to meet with the lessees in February to discuss the whole issue. Had it done so, this application may not have been opposed by the lessees. As there has been no hearing and the costs involved on the part of the Applicant's managing agent will have been in-house costs, the Tribunal makes an order under Section 20C of the 1985 Act.

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Bruce Edgington
Regional Judge
22nd July 2013