



9166

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

Case Reference : **CAM/00ME/LDC/2013/0014**

Property : **Bearsden Court, Charters Road,
Sunningdale, SL5 9SJ**

Applicant : **Elmbirch Properties Plc.
Represented by Remus Management**

Respondents : **Mr. J. Boyer (Flat 1)
Mrs. D.K. Phillips (Flat 2)
Mr. A.C. Howe (Flat 3)
JAS Investments UK Ltd (Flats 4 & 5)
Mr. & Mrs. H. Crawford (Flat 6)
Mr. & Mrs. J.K. Braithwaite (Flat 7)
Mr. B. Ferguson (Flat 8)
Ms. M.P. Imrie (Flat 9)
Mr. & Mrs. C. King-Farlow (Flat 10)**

Date of Application : **20th June 2013**

Type of Application : **Section 20ZA of the Landlord and
Tenant Act 1985, as amended ("the
1985 Act")**

Tribunal : **Judge J. Oxlade
S. Redmond BSc. ECON MRICS**

**Date and venue of
Hearing** : **7th August 2013
Hilton Bracknell, Bagshot Road,
Berkshire, RG12 0QJ**

DECISION

For the following reasons the Tribunal ¹ grants dispensation from the consultation requirements set out in Part 2 to Schedule 4 of the Service Charges (Consultation etc.) (England) Regulations 2003 in respect of works to the gate at the entrance of the development.

¹ The Decision recorded in this document was made by the First-tier Tribunal (Property Chamber) rather than the leasehold valuation tribunal, to whom the application had been made, because by virtue of The Transfer of Tribunals Function Order (2013 No1036) ('the Transfer Order') the functions of leasehold valuation tribunals were, on 1st July 2013, transferred to the First-tier Tribunal (Property Chamber). In this Decision the expression 'the Tribunal' means the First-tier Tribunal (Property Chamber).

Background

1. The Applicant is the freeholder of the premises, and the Respondents are lessees of the ten flats in the development.
2. The leases of the flats impose obligations on the Applicant to maintain and repair the premises, and corresponding obligations on the Respondents to pay service charges to meet the costs of the Applicant discharging its responsibilities.
3. Paragraph 1 of Part A of the Sixth Schedule, provides that the Applicant shall maintain, repair, and where necessary reinstate any boundary wall hedge, fence, railing or gate. Further, paragraph 11 of Part B of the Sixth Schedule provides that the Applicant shall inspect, maintain, repair, reinstate, improve and renew any other equipment, and provide any other service or facility which in the opinion of the lessor was reasonable to provide.
4. The development is gated, with one wide electric gate. At the end of April/beginning of May 2013 the gate failed, and with some fortune the gate failed in the open position. Investigations showed that the track and wheels of the single gate were “v” shaped, which put strain on the motor. Further, the existing arrangement did not comply with current safety standards, being without safety strips, which would cause the gate to halt if it came into contact with a person, vehicle, or object. The Applicant consulted with the Residents’ Association, who wished the Applicant (through its Managing Agents, Remus Management) to act with some haste to sort out the problem.
5. Remus sought quotes, in which the contractors gave expert advice about the reasons for the failure and the actions needed to remedy the fault and to improve the existing system. The existing service contractor (SCS) was invited to quote for the work, as one of three contractors.
6. The residents considered themselves and their cars vulnerable without a functioning gate, largely because all of the developments along the road are gated, and so they considered that the open gate invited unwanted attention.
7. It was settled upon that the quotes would be received, that the consultation procedure would be started, and then an application made to the Tribunal for dispensation. An application was regarded as necessary because one of the lessees in the building has challenged service charges, and so an application under section 20ZA would be made as a precaution.

Application

8. Accordingly, on 5th July 2013 the Tribunal received an application made by Remus Management on behalf of the Applicant. In it the Applicant said that the main gate had failed a safety test, and that the motor had failed; it was propose to start the works when the Residents’ Association was satisfied with the quotes. The First step of the consultation procedure had been followed, as a letter had

been sent to the lessees. Further, that the lessees wished to have the works done as soon as possible, because of the possible lapse in security.

9. The Tribunal made directions for the filing of evidence by the Applicant and gave leave for any lessee to file a statement in rely if they wished to do so. Time was expedited in view of the urgency of the application.

Hearing

Inspection

10. Prior to the hearing the Tribunal inspected the gate at the entrance to the premises, which gate was fully functioning, the works having been completed the previous Friday. The work consisted of (a) a replacement track (b) a replacement motor (c) new safety edges (d) powder-coated wire mesh attached to the gate.

Hearing

11. The hearing was attended by Mr. Kevin Traynor (Property Manager) Lizzy Ellis from Remus Management, and John Boyer (lessee of flat 1, and Chairman of the Residents' Association), and Charles King- Farlow (lessee of flat 10, and Secretary of the Residents' Association).

12. A bundle had been filed by the Applicant, but there was no statement filed nor response made by any Respondent.

13. The Applicant explained that the motor had failed at the end of April/beginning of May, and this left the gate in the open position. The Applicant consulted with the Residents Association, which indicated that the residents wished to see the gate repaired immediately.

14. Three quotes were obtained from known contractors, including SCS, which company had a maintenance contract to do the works. The reasons for the problems were reported by the contractors, whose quotes were provided at tab 12 of the bundle, along with a chart comparing the various elements of the quotes, and the costs. The quotes were variously £2904.00, £4776.00, and £5572.80. The cheapest did not include the replacement of the rails and wheels, nor addition of mesh, which the others did include. The cheaper of the remaining two quotes was chosen.

15. All lessees were notified of the works by the Managing Agent, and the Residents' Association also spoke to all (or attempted to speak to all) of the lessees living in the UK.

16. As to compliance with the consultation requirements, the Managing agents sent a letter to each lessee dated 21st June 2013, which explained that the gate was not safety compliant, and that the motor had failed because of a v-shaped track which had put extra strain on the motor. The reasons for carrying out the

works were because the gate is open and this gives rise to security issues. The costs of the works would exceed the £250 threshold, and so consultation needed to take place. They invited comment and observation to the Managing Agents within 32 days of the date of the letter. They invited nominations of suitable contractors.

17. Within the 32-day consultation period, by letter dated 11th July 2013 the Managing Agents wrote again to the lessees to say that the Residents Association had selected Eagle Automation as the preferred contractor and wished to proceed with the works on 25th July 2013.

18. On behalf of the Residents' Association, Mr Boyer and Mr. King-Farlow said that they had received no objections to the work being carried out; rather the reverse. They praised the Managing Agents handling of the matter, and said that they were delighted with the contractors, who had put themselves out to get the works done, despite the weather.

19. At the end of the hearing the Tribunal gave a short oral decision and reasons for concluding that dispensation would be granted.

The Relevant Law

20. Section 20 of the 1985 Act requires that a consultation procedure be followed where works are to be undertaken resulting in any one flat incurring costs of £250 or more. The consultation procedure is set out in Part 2 to Schedule 4 of the Service Charges (Consultation etc.) (England) Regulations 2003².

21. Where the lessor has not complied with the procedure, dispensation can be sought pursuant to section 20ZA of the 1985 Act, which the Tribunal shall grant "if satisfied that it is reasonable to dispense with the requirements". In the case of Daejan Investments Limited v Benson [2013] UKSC 14, guidance was issued on what factors a Tribunal should consider when considering a section 20ZA application. The Tribunal should focus on the extent to which the Lessees were prejudiced by the failure to comply with the consultation requirements (i.e. by paying for inappropriate works or paying more than would be appropriate as a result of the failure to comply or otherwise). If there is no prejudice then dispensation will be granted. If the Lessees establish a credible case for prejudice, then the Lessor will need to rebut it; in looking at this point the Lessees need to establish what they would have said/done had there been proper consultation. The Tribunal can grant dispensation on terms, and so the Lessor should give some thought to what might be offered as "terms". The contents of the witness statements/submissions should focus on these points.

Discussion

22. The Tribunal has had regard to the relevant law as set out in paragraph 21 and Appendix A.

² Set out fully in Appendix A

23. The Tribunal examined the provisions of the lease, particularly the provisions set out in paragraph 3 above which provide that the freeholder do the works subject to this application, and that the costs are recoverable from the lessees. The cost of these works when divided in accordance with the proportions set out in the lease, would be over the £250 threshold for some lessees.

24. It is apparent that the freeholder has partly complied with the consultation requirements, namely paragraphs 8 and 9 of the Regulations. The period of consultation was curtailed by the decision to select a contractor, and so paragraphs 10 and onwards were not complied with. The decision to select the contractor was notified to all lessees, and the works commenced two weeks later.

25. It is apparent that the freeholder consulted with the Residents' Association, who informally consulted the residents. There were none who objected to the works, or the costs, nor that the works should proceed immediately. There were three quotes obtained, one from the contractor nominated and initially favoured by the Residents' Association, but the cheaper of the two comparable quotes was selected by the Residents' Association.

26. The Residents' Association has been consulted continually at each step of the way, and indeed in many respects has set the pace of the works, and asked for the consultation procedure to be foreshortened. They have expressed contentment with the works, the costs, and the manner in which the matter has been handled. The Tribunal has received no opposition from any quarter on the works, the costs, or the application. It is a pity that where there seems to be such a large measure of agreement, an application had to be made to the Tribunal. Mr. Traynor had done so as a precaution, because there had been problems with past recovery of service charges. His handling of the matter received praise from the Residents' Association, and we were told that his costs in handling the matter would amount only to £210 (3 hours at £70 per hour), to which VAT would be added.

27. There had been a good deal of consultation of an informal kind, and the commencement of the formal process. The lessees nominated a preferred contractor, who provided a quote; the lessees elected for the alternative contractor to be given the job; the lessees elected for the works to take place without delay. The process has largely been led by the lessees. Accordingly, the Tribunal is satisfied that no prejudice had been suffered by the lessees by virtue of the shortening of the consultation procedure; indeed no case was argued by anyone that there had been prejudice.

.....

Joanne Oxlade
Judge of the First Tier, Property Chamber (Residential Property)

13th August 2013

Appendix A

PART 2 CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS FOR WHICH PUBLIC NOTICE IS NOT REQUIRED

Notice of intention

- 8.— (1) The landlord shall give notice in writing of his intention to carry out qualifying works—
- (a) to each tenant; and
 - (b) where a recognised tenants' association represents some or all of the tenants, to the association.
- (2) The notice shall—
- (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
 - (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
 - (c) invite the making, in writing, of observations in relation to the proposed works; and
 - (d) specify—
 - (i) the address to which such observations may be sent;
 - (ii) that they must be delivered within the relevant period; and
 - (iii) the date on which the relevant period ends.
- (3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

- 9.— (1) Where a notice under paragraph 1 specifies a place and hours for inspection—
- (a) the place and hours so specified must be reasonable; and
 - (b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.
- (2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

10. Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates and response to observations

11.— (1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out—

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

- (c) make all of the estimates available for inspection.
- (6) At least one of the estimates must be that of a person wholly unconnected with the landlord.
- (7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord—
 - (a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
 - (b) where the landlord is a company, and the person is a partner in a manager of the company or is a close relative of any such director or manager;
 - (c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;
 - (d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or
 - (e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.
- (8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.
- (9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—
 - (a) each tenant; and
 - (b) the secretary of the recognised tenants' association (if any).
- (10) The landlord shall, by notice in writing to each tenant and the association (if any)—
 - (a) specify the place and hours at which the estimates may be inspected;
 - (b) invite the making, in writing, of observations in relation to those estimates;
 - (c) specify—
 - (i) the address to which such observations may be sent;
 - (ii) that they must be delivered within the relevant period; and
 - (iii) the date on which the relevant period ends.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

12. Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

13.—(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)—

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) where he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.