

Q290



FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : CHI/00HN/LDC/2013/0042

Property : 49-51 Old Christchurch Road, Bournemouth
Dorset BH1 1EG

Applicant : The Royal Bank of Scotland Plc (the Landlord)

Representative : Mr Selway of Counsel

Respondents : R Clark, J Brassington, A Hellyer, N Brassington
(Flats 1,3 & 4) Belgohunt Limited (Flat 2)
(the Tenants)

Representative : Mr Howard of Coles Miller LLP [First four named
Respondents only]

Type of Application: Application for dispensation of consultation
requirements provided for by Section 20 of the
Landlord and Tenant Act 1985

Tribunal Members : Judge P.J. Barber Chairman
Mr A J Mellery-Pratt FRICS Valuer Member
Ms T Wong Lay Member

Date and venue of Hearing : 7th August 2013 Court No. 8, Bournemouth
County Court, Deansleigh Road,
Bournemouth, Dorset BH7 7DS

Date of Decision: 16th August 2013

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 as follows from the consultation requirements of Section 20(1) of the 1985 Act, and subject to the following conditions :-
 - (a) Dispensation is granted from the consultation requirements in relation to the completed roof works subject to the condition that such dispensation is limited to the sum of £13,294.80 (including VAT) plus the apportioned cost of scaffolding provision for the period from 22nd July 2013 to 6th August 2013.
 - (b) Partial dispensation is granted from the consultation requirements in relation to the works (excluding the roof works) as detailed in the Initial Notice dated 4th July 2013, conditional on the Applicant :-
 - (i) Preparing or procuring the preparation of a proper and detailed specification for such works; and
 - (ii) Carrying out a proper tendering procedure in relation to such specification described in (i) above; and
 - (iii) Properly complying with the remaining consultation requirements of Section 20 of the 1985 Act, namely carrying out second stage consultation and/or if appropriate third stage consultation (save that the Tribunal accepts that the said Initial Notice dated 4th July 2013 is deemed to be an adequate first stage consultation notice for the purposes of the requisite regulations); and
 - (iv) The Applicant paying the legal and surveyor`s costs of the Respondents in relation to these proceedings, to an aggregate maximum of £2,500.00 & VAT.

BACKGROUND

2. This matter relates to an application made by the Applicant pursuant to Section 20ZA of the Act in relation to 49-51 Old Christchurch Road Bournemouth Dorset BH1 1EG ("the Building") to dispense with the consultation requirements in regard to certain work.

3 The work covered by the Application under section 20ZA of the Act comprises repair work to the roof, façade, external elevations and windows of the Building ("the Works"). The Applicant states that the repair work to the roof is required to address complaints by the tenants in relation to water ingress ("the Works"). The application refers to a Headlease and four Sub-Leases and also refers to certain alleged discussion between the Applicant`s managing agents GVA Grimley Limited ("GVA"), and the tenant and sub-tenants in regard to the Works.

4. On 10 July 2013, the Tribunal issued directions in the matter broadly requiring the Applicant/Landlord to provide copies of all documentation on which it seeks to reply in support of its application.

5. The Applicant had filed separately, two bundle which in summary included copies of the following :

(1) Various Land Registry entries

(2) Underlease dated 15 November 2000 made between The Royal Bank of Scotland Plc (1) Roger Clark & John Brassington (2)

(3) Underlease dated 28 September 2001 [Second Floor Flat No.1] made between Roger Clark & John Brassington (1) Roger Clark; John Brassington; Angela Hellyer & Nina Mary Brassington (2)

(4) Underlease dated 28 September 2001 [Second Floor Flat No. 2] made between Roger Clark & John Brassington (1) Roger Clark; John Brassington; Angela Hellyer & Nina Mary Brassington (2)

(5) Underlease dated 28 September 2001 [Third Floor Flat No. 3] made between Roger Clark & John Brassington (1) Roger Clark; John Brassington; Angela Hellyer & Nina Mary Brassington (2)

(6) Underlease dated 28 September 2001 [Third Floor Flat No. 4] made between Roger Clark & John Brassington (1) Roger Clark; John Brassington; Angela Hellyer & Nina Mary Brassington

(7) Notice of intention to carry out work dated 4th July 2013

(8) Particulars of Claim for dispensation dated 30th July 2013.

6. The Tribunal was referred in the Applicant`s particulars of claim, to a letter dated 16th July 2013 signed by the first four individual respondents, authorising Mr Clark and Mr Brassington to represent them in these proceedings. The fifth respondent, a limited company, Belgohunt Limited is represented by one of its` directors, Mr Richard Hunter.

INSPECTION

7. Mr Selway of Counsel and Mrs Saira Ahmed of GVA, attended on behalf of the Applicant, together with Mr Newport and Mr Richards of Shaylors, the Applicant`s contractor. Mr Andrew Howard, Mr Matthew Lewis and a work experience student attended for the first four named Respondents, together with the Respondent`s surveyor Mr Ellis. Mr Hunter a director of the fifth named Respondent Belgohunt Limited also attended together with his letting agent Mr Osborne. Mr Clark was present, but Mr Brassington was abroad on holiday. The Building is a Grade II listed property, located on the corner of Old Christchurch Road and Albert Road; it comprises commercial bank premises on the ground and first floors, and 4 residential flats arranged over the second and third floors as follows :-

Second Floor Flat No. 1

Second Floor Flat No. 2

Third Floor Flat No. 3

Third Floor Flat No. 4

The four residential flats are let under a single Headlease dated 15th November 2000 and there are four separate Sub-leases of each of the four individual flats. An internal inspection was made of Flats 2 & 4 as a result of which certain damp

stains to the inside faces of various outside walls were noticed. The Tribunal also inspected the exterior elevations although these were partially obscured, being clad in scaffolding with mesh netting.

THE LAW

8. Section 20 of the Act limits the service charge contribution that lessees have to make towards “qualifying works” if the relevant consultation requirements have not been complied with, or dispensed with by a Leasehold Valuation Tribunal. Sub-Section 20(3) of the Act provides that *“This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.”*

9. Regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations SI 2003/ 1987 (“the Regulations”) provide in effect, that if a lessee has to contribute more than £250.00 towards any qualifying works, then if the landlord wishes to collect the entire costs of those works, the landlord must either carry out consultation in accordance with Section 20 of the Act before those works are commenced, or obtain an order from the Tribunal dispensing with the consultation requirements.

10. The consultation requirements are set out in the Regulations and it is not proposed to repeat them here. However, in summary, they include the need for the landlord to state why it considers the works are necessary and for further statements setting out their response to observations received from the tenants, and their reasons for the selection of the successful contractor. A tenant has the right to nominate an alternative contractor and the landlord must try to obtain an estimate from such a nominee.

11. Under Section 20ZA(1) of the Act, the Tribunal is given discretion to dispense with the consultation requirements. This Section provides :

“Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any 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 those requirements”.

12. The test is one of reasonableness. Is it reasonable in the circumstances of the case to dispense with all or any of the requirements ? The decided cases have established that it is not necessarily the conduct of the landlord that has to be reasonable, rather it is the outcome of making the order which has to be reasonable, taking into account all the circumstances of the case. The Tribunal should also have regard to any prejudice that a lessee might suffer in the event of dispensation being granted.

THE EVIDENCE

13. The Applicant submitted that notices of intent (“the First Stage Notice”) had been served upon the Respondents on 4 July 2013 in regard to the Works. Mr Howard produced at the hearing, copies of a letter dated 31st July 2013 sent by Coles Miller LLP to GVA detailing responses to the First Stage Notice. Mr Howard also produced a chronology, an estimate for the Works from Phillipson-Masters and a letter from the surveyor Mr Ellis, dated 5th August 2013. The Applicant produced at

the hearing a further amended interim pricing breakdown, work summary and plans. The Applicant's contractor had already started the Works on 22nd July 2013; the works to the roof were in effect completed; however other works detailed in the First Stage Notice had not been so completed.

HEARING

14. Mr Selway and Mr Howard broadly concurred that the application was in two parts – (1) in relation to the completed roof repair and (2) the prospective other works as listed in the First Stage Notice and yet to be completed. The cost of the roofing work as detailed at Tab 11 of the Applicant's bundle was £22,158.00 plus VAT plus Shaylor's fees plus an apportionment for scaffolding. Estimates for the cost of the prospective other works were not finally settled. In broad terms Mr Selway submitted that the roof repairs had been carried out to address the urgent requirements of the tenants arising from the problem in relation to water leaks. Mr Selway accepted that an element of the present damp ingress problem may in fact relate to other possible causes, such as the opening up works undertaken by the Applicant's contractors and the condition of the parapets, stucco and brickwork. Mr Howard submitted that in broad terms that the Respondents had concerns as to the huge variations in projected costs for all the works, the lack of communication and opportunity for access and inspection meant that the tenants did not have the opportunity to ascertain the true cause of the damp or the necessary works needed, the fact that only one estimate for the works had been obtained and the excessive cost and nature of the works generally.
15. Mr Selway called Mrs Ahmed to give evidence; Mrs Ahmed said that a separate company Integral, had been advising the Applicant generally in regard to the Building and various reports had been obtained. Initially it was thought there may be a problem with dangerous or falling masonry and scaffolding was, she said, erected in January 2013 with protective netting. Mrs Ahmed acknowledged that the costs of the works were always going to be subject to change. At the point when complaints were made by the tenants in April 2013 about water ingress, Mrs Ahmed said she was unaware that other reports for works were being undertaken by various advisers of the Applicant. Mrs Ahmed said there had been delays initially whilst a short term or interim solution to the water ingress problem was considered and further, the views of the Conservation Officer from the local authority were being sought. Another firm, Lewis & Hickey had been commissioned by the Applicant to deal with the listed building issues. Mrs Ahmed accepted that with this many advisers and contractors involved, on the Applicant's part, there had been a breakdown in communication with the tenants, referring to a "communication black hole" but added that initially the Applicant had been proceeding, before the damp problems arose on the basis that they had not intended to recover the cost of works in the region of £30,000 to the Building, from the tenants, but subsequently the Applicant changed its minds. Mr Howard put various matters to Mrs Ahmed who accepted that the estimated figure of £199,000 for works was known by the Applicant way back in March 2013 but not communicated to the tenants. Mrs Ahmed stated that since the Applicant had obtained only one estimate for the works, it saw it as reasonable and agreed to deduct 15% from the costs of the roof work before any recharge to tenants.
16. Mr Howard called Mr Clark to give evidence; Mr Clark was adamant that the scaffolding had been erected in December 2012; he said that at the time the

impression given to the tenants was that no cost for works would be reimbursed to them. Mr Clark said he had only become aware of the figure of £248,000, but now altered again by the date of the hearing, and the Applicant's intention to recharge this costs to the tenants, in late July 2013. Mr Howard also called Mr Ellis to give evidence; Mr Ellis was similarly adamant that the scaffolding had been erected in December 2012 and he stated that in his opinion the dampness to the walls observed at the inspection was due in parts to other exploratory or opening up work carried out recently by the Applicant's contractors and in respect of which, in his view, protective measures should have been taken. Mr Ellis said that overall in his view the Applicant was trying to "make a meal of it" with all the works proposed. Mr Ellis handed to the Tribunal a photograph of war damage to adjoining premises in 1943 which he said may account for certain damage, now dormant, but having been in existence for a long period, such as cracks to window heads. Mr Ellis said he thought none of the works were truly urgent, not even the water ingress problem which he said was a dampness issue, not involving for example, water pouring through the Building. In response to questions by Mr Selway, Mr Ellis admitted that though he has over 40 years of working experience in the field, currently he does not hold a professional qualification and that he does act as letting agent in respect of certain of the flats in the Building. Mr Ellis also offered evidence in regard to leadwork detailing in the roof works and the requirements of the Conservation Officer. Mr Ellis said that the estimate for the works of £13,995 & VAT & scaffold costs from Phillipson-Masters provided a cost guide only; he said proper estimates could only be prepared if a proper and full specification was prepared; Mr Ellis said that the document at the Applicant's Tab 11 in their bundle was certainly not a proper specification with details, items and quantities. Mr Ellis also said the required proper tendering process for the roof and proposed works had not been undertaken.

17. Mr Hunter submitted to the Tribunal for Belgohunt Limited that he was a surveyor with many years experience. Mr Hunter said that the tenants had been given no indication by the Applicant that contribution would be sought from them towards the cost of the work until late July 2013, being only about a week before this hearing and when the as yet still unfinalised figure of £199,000 was first mentioned. Mr Hunter said that the prospect of contributing towards such a large amount suddenly out of the blue was a huge issue for him. Mr Hunter suggested the works may involve an element of improvement but that the tenants were prejudiced and that no proper opportunity had been afforded for tenants to inspect the Building so as to be clear about what was proposed. Mr Hunter also advised the Tribunal that Belgohunt Limited is now the leaseholder of two of the flats in the Building.
18. In closing, Mr Howard confirmed that the Respondents wished to be reasonable; he referred to the decision in *Daejan -v- Benson [2013] UKSC 14* and submitted that dispensation may be granted subject to conditions to address any prejudice which tenants might otherwise suffer. Mr Howard said that in the absence of a proper specification the Respondents were in difficulty in seeking a proper comparable estimate; he also suggested that conditions might be attached to any dispensation providing for the Applicant to be responsible for the Respondents' legal and surveyor's fees. Mr Howard said that consultation could have been commenced in March 2013 but the applicant had left it until July 2013 to do so.

19. In closing, Mr Selway referred to the test of reasonableness and also alluded to the decision in the *Daejan* case accepting that certain conditions may be attached to any order for dispensation. Mr Selway said the tenants had repeatedly stressed the urgency of the work required to remedy the water ingress problem and he referred to the balance of prejudice in relation to doing such remedial works urgently, so as to satisfy the tenants, but thereby not complying with the consultation requirements. Mr Selway suggested that the offer put forward by Mrs Ahmed of a 15% discount of the roof work costs could be incorporated as a condition of dispensation if need be.
20. In his closing, Mr Hunter submitted that it should not have taken four months to remedy the water ingress problem; he said the tenants are suffering losses as a result of their sub-tenants' complaints and also the safety issue, with the potential of criminal activity resulting from the scaffolding being in place for so long.

DETERMINATION

21. We, the Tribunal have taken into account all the oral evidence and those case papers to which we have been specifically referred and the submissions of the Applicant and accordingly, taking all the circumstances into account and for the reasons stated above, the Tribunal is satisfied that it is reasonable for it to grant dispensation from all the requirements of Section 20(1) of the Act in respect of the works subject to certain conditions, and it so determines.
22. The Tribunal considers it appropriate to deal with dispensation separately for (1) the completed roof works; and (2) the prospective other works as follows :-
 - (1) The Tribunal notes that the Applicant has used a number of different professional advisers and contractors and subcontractors and takes the view on the evidence given that there was a degree of confusion and lack of clarity and integration as between them which resulted in a lack of clear information being provided sufficiently early to the Respondents, including the "communication black hole" as acknowledged by Mrs Ahmed, that these are likely to result in some prejudice to the Respondents. Accordingly the decision of the Tribunal in regard to the roof works, is that dispensation shall be granted from the consultation requirements subject to the condition that such dispensation is limited to 50% of the £22,158.00 estimate for the cost of such works & VAT (being $50\% \times £22,158.00 = £11,079.00$ & 20% VAT) = £13,294.80, plus the apportioned cost of scaffolding provision for the period 22nd July 2013 to 6th August 2013.
 - (2) The Tribunal considers it appropriate to provide partial dispensation for such other works, deeming however, that the First Stage Notice is a sufficient initial notice for the purposes of the requisite regulations; however in order to avoid prejudice to the tenants, the Applicant shall be required to prepare a full and detailed specification in relation to such works, obtain tenders in relation thereto and then serve second stage (and if need be third stage) consultation notices upon the Respondents as required by the legislation.

The Tribunal further takes the view that it is reasonable in all the circumstances to provide that the Applicant shall pay the Respondents' legal and surveyor's fees in these proceedings to an aggregate maximum of £2,500.00 & VAT.

23. The Tribunal makes it clear that this dispensation relates solely to the requirement that would otherwise exist to carry out the procedures in accordance with Section 20 of the Act. It does not prevent an application being made subsequently by the Respondents under Section 27A of the Act to deal with the resultant service charges. It simply removes the cap on the recoverable service charges which Section 20 would otherwise have placed upon them and in regard to the Works only.
24. We made our decisions accordingly.

Judge P J Barber (Chairman)

A member of the Tribunal
appointed by the Lord Chancellor

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.