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

Case Reference : **LON/OOAG/LDC/2013/0012**

Property : **The Clocktower, 49 Heath Street,
London NW3 6UD**

Applicant : **Edra Properties Limited**

Representative : **Jeremy Hayes**

Respondent : **The leaseholders as set out in the
appendix to the application**

Representative : **None**

Type of Application : **For dispensation from the
consultation requirements under
20ZA of the Landlord and Tenant
Act 1985**

Tribunal Members : **Judge O'Sullivan**

**Date and venue of
Hearing** : **10 Alfred Place, London WC1E 7LR**

Date of Decision : **13 August 2013**

DECISION

Decisions of the Tribunal

- (1) The Tribunal determines that dispensation shall be granted on the terms set out below.

Background

1. This case involves an application dated 24 January 2013 and received on 25 January 2013, in which Edra Properties Limited (“Applicant”) seeks an order for the dispensation of all or any of the consultation requirements of section 20 of the Landlord and Tenant Act 2005. This application is made without prejudice to the Applicant’s contention that there was no breach of the consultation requirements.
2. The Property concerned is described in the application as the Clocktower Flats at 49 Heath Street, London NW3 6UD (“the Property”) and is made against the various leaseholders listed in Appendix 1 attached to the Application (“the Respondents”).
3. Both the Applicant and the Respondents consented to the application being considered by way of a paper determination. Directions were made dated 25 January 2013. In accordance with those directions both parties made submissions and submitted a bundle of documents for the Tribunal’s consideration. In the Respondents’ joint submissions received on 28 February 2013 reliance was placed inter alia on the *Daejan v Benson [2011] 1. W.L.R. 2330*. On 6 March 2013 the Supreme Court issued its decision in the appeal in this case reference [2013] UKSC 14. The parties were accordingly asked for any further submissions in relation to this decision. The Respondents also submitted further representations dated 20 May 2013.
4. The issue in the case is whether the consultation requirements of section 20 of the Act should be varied or dispensed with.

The Applicant’s case

5. The Applicant lodged its statement of case and bundle by letter dated 11 February 2013. Its statement of case was only some one and a half pages long. It set out the background to the notices and consultation carried out under section 20 on page one. On page two it set out what it described as

its “grounds for appeal” but what the Tribunal understands to be its grounds for seeking dispensation.

6. In short dispensation is sought for the following reasons:
 - The stage 1 notice served on 17 August 2002 was accepted to have omitted reference to the 30 day consultation period
 - However the notice dated 17 August 2004 stated “*If we do not hear from you within 30 days then we will proceed to Stage 2*”. The Applicant submits that this implied that this was the consultation period together with guidance notes sent with the first letter of 12 January 2004
 - The Lessees were said to be well aware of their rights
 - No queries or requests for further information were received
 - The omission was a minor breach of procedure causing no prejudice to the tenants

The Respondents’ Case

5. The Respondents made joint submissions sent to the tribunal under cover of a letter dated 27 February 2013.
6. In short the application is opposed for the following reasons:
 - The tribunal may only dispense with the consultation requirements if it reasonable to do so.
 - The principal consideration is whether any significant prejudice has been suffered by the tenant as a result of the landlord’s failure to comply (*Daejan v Benson [2011] 1. W.L.R 2330*).
 - Where a tenant has suffered significant prejudice it will never be appropriate to grant dispensation (*Camden LBC v The Leaseholders of 37 Flats at 30-40 Grafton Way LRX/185/2006*).
 - The stage 1 notice failed to comply with almost all of the requirements, the tenants were not informed of what works the landlord intended to carry out, why the landlord considered them to be necessary and the tenants were not invited to comment on the works. The ambiguous reference to “refurbish the interior common parts” was submitted to be plainly not sufficient to describe works which allegedly included external repairs and redecorations.
 - The purpose of the consultation was frustrated. These failures are the reasons why no observations were received. The tenants had no opportunity to influence the landlord’s decision and were cut out from the beginning

- The numerous specifications were prepared between 2002 and 2008/09 but none were served on the leaseholders.
- The stage 2 notices said to be sent out on 19 February 2007 confirmed a contractor had been appointed and was accompanied by a demand for payment, at this stage it was a fait accompli.
- There is confusion and the Applicant changes its case as to when the stage 2 notices were sent out. The notice dated 17 August 2004 refers to the Applicant proceeding to Stage 2. The next notice sent to the leaseholders was not until 19 February 2007 and purporting to comply with Stage 3 informed leaseholders that Hardy Construction had been appointed.
- The Applicant appears to suggest that in February 2007 the Applicant considered that the notice dated 17 August 2004 complied with both stage 1 and 2 of the consultation. This is however impossible as they stages contain entirely separate requirements. Stage 2 was omitted in its entirety.
- Reliance was placed on para 35 in Grafton Way which the Respondent say is a direct analogy in which the President said
“In the present case Stage 2 was entirely omitted. It was a gross error which manifestly prejudiced the leaseholders in a fundamental way. ..What the leaseholders were not provided with was the basic information about the tenders, the opportunity to inspect the tenders and the opportunity to make observations on them, with the Council being obliged to take those observations into account and publish them later together with their response to them. The extent to which, had they been told of the estimates, the leaseholders would have wanted to examine them and make observations upon them can only be a matter of speculation. The fact is they did not have the opportunity and this amounted to significant prejudice.
 “
- The Respondents are not able to confirm if the contractor awarded the contract had any connection with the freeholder as no stage 2 notice was served. Hardy Construction Ltd was incorporated at the date the notice was served.
- The substantial delay between the notice dated 17 August 2004 and the notice dated 19 February 2007 made the process of consultation worthless. The scope and nature of the works may have changed over the period.
- The cost of the major works significantly increased without the tenants being informed or given the opportunity to comment
- The substantial delay and changes made render the entire consultation process seriously defective and caused the tenants significant prejudice.
- In response to the Applicant’s submissions the Respondents say that the “guidance notes on section 20” do not provide any of the information required by a stage 1 notice and fails to diminish the prejudice suffered

- The fact that the tenants failed to point out defects is irrelevant, it is not for tenants to point out any defects in the consultation process
 - The failure to comply with the consultation requirements were not “minor” but were numerous and serious and as a result the tenants suffered serious prejudice
7. By a document dated 20 May 2013 further submissions were made for the Respondents. These were made post the decision in *Daejan v Benson*. It was submitted that if the Tribunal was minded to grant dispensation it should be granted on terms that;
- (i) The recoverable costs should be limited to £65,000, this being the figure the Applicant originally said the works would cost
 - (ii) The Applicant pay the Respondents the Respondents’ costs of proving non-compliance with the consultation requirements
 - (iii) The Applicant pay the Respondents the Respondents’ costs of responding to the application for dispensation.
8. As regard to 7(i) the Respondents say that it is clear from the majority decision in *Daejan v Benson* that insofar as a tenant acts reasonably in investigating of establishing prejudice and investigating and challenging the application for dispensation his costs fall to be paid as a condition of dispensation. It is further submitted that 15 hours of Counsel’s rate of £200 per hour plus Vat would be reasonable.
9. The Respondents also say that to this should be added the Respondents’ costs in establishing non-compliance with the consultation requirements. It is noted that the Supreme Court has yet to make its decision in this regard. In this regard the Respondents incurred costs of £7,500 in case reference LON/OOAG/LSC/2012/0120.

The Tribunal’s decision

10. The Tribunal has the jurisdiction to grant dispensation under section 20ZA of the Act “*if satisfied that it is reasonable to dispense with the requirements*”.
11. However the recent decision in *Daejan v Benson* referred to above has provided the Tribunal with guidance in relation to any application under section 20ZA and in what circumstances dispensation may be granted on terms and the approach to be adopted when prejudice is alleged by tenants.

12. The tenants in this case allege that they have suffered substantial prejudice, particularly since the Stage 1 notice was said to have failed to comply with almost all of the requirements and the Stage 2 notice was a *fait accompli*. The tenants in this case were originally informed that the estimated works were approximated at £65,000; the actual cost of the works was far in excess of this sum. When the Stage 2 notice was served the scope of the work had changed dramatically and the tenants were deprived of the opportunity to comment on those works. The tribunal was not therefore minded to grant unconditional dispensation. Rather the tribunal considers that dispensation should be granted on terms. The Applicant has not made any reply to the submissions made by the tenants as to the terms upon which any dispensation should be granted.
13. The tribunal has concluded that a Dispensation Order pursuant to section 20ZA of the Act as requested by the Applicant shall be granted on the following terms;
- (iv) The recoverable costs of works should be limited to £65,000, this being the figure the Applicant originally said the works would cost
 - (v) The Applicant pays the Respondents the Respondents' costs of proving non-compliance with the consultation requirements in the sum of £3,00 plus Vat
 - (vi) The Applicant pays the Respondents the Respondents' costs of responding to the application for dispensation in the sum of £7500 plus Vat.

Sonya O'Sullivan

Dated: 13 August 2013