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**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference : CAM/00KF/LDC/2015/0004

Property : 59 Westcliff Park Drive,
Westcliff-on-Sea,
Essex SSo 9LW

Applicant : **Property and Commercial Enterprises
(PACE) Plc**

Respondent : **Jane Frances Roberts**

Date of Application : 12th March 2015

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”))**

Tribunal : **Bruce Edgington (lawyer chair)
Roland Thomas MRICS**

DECISION

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1. The Applicant is refused dispensation from further consultation requirements in respect of works to repair the top part of the walls and roof area, loose rendering to the chimney stack and capping and ventilating the flue to the rear extension of the building consisting of 59 and 59a Westcliff Park Drive as set out in detail in the application.

Reasons

Introduction

2. This is an application for dispensation from the consultation requirements in respect of ‘qualifying works’ to the top part the rear extension of the building of which the property forms part as set out in the decision above.
3. The flats known as 59 and 59a Westcliff Park Drive are the constituent parts of a detached house in Westcliff-on-Sea. It does not appear to be disputed that the Applicant is both the freehold owner of the building and the long leasehold owner of the first floor flat known as 59a Westcliff Park Drive. The Respondent is said to be the long leasehold owner of the property which is the ground floor flat known as 59.

4. A procedural chair issued a directions order on the 13th March 2015 timetabling this case to its conclusion. The first direction said that the Applicant had to set down in a statement, the history of the problem and attach copies of any reports obtained plus any estimate (or an explanation if there are none) and copies of any correspondence with the Respondent. It failed to do so until the Tribunal wrote on the 31st March cancelling the hearing as this direction had not been complied with. A statement was then produced but without the attachments or any explanation as to why there were no estimates.
5. The next direction said that if the Respondent wanted to reply to the application, she must do so by 27th March. She did not until an e-mail was received on the 2nd April i.e. the working day before the hearing because of the Easter break, saying that she would not be at the hearing. An e-mail was also received from the Applicant at that time attaching surveyor's reports, a copy of the first consultation letter dated 2nd March 2015 and specification of works. The Tribunal decided to proceed with the hearing.

The Law

6. 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.
7. The landlord's proposals, which should include the observations of tenants, and the amount of the estimated expenditure, then have 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. Of particular relevance to this case, at least one of the estimates must be from a contractor "*wholly unconnected with the landlord*".
8. 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 so to do.

The Lease terms

9. A copy of the lease of the property was produced. It is dated 16th April 1998 and is for a term of 99 years commencing on that date with an increasing ground rent. It provides that the landlord is responsible for keeping the structure, including the roof, in repair subject to the lessee paying half the cost.

The Inspection

10. The members of the Tribunal inspected the building in which property is situated on a bright, sunny spring morning. It is in a detached property in a

typical road in Westcliff-on-Sea built in the early part of the last century consisting mainly of terraced and semi-detached houses. It is within walking distance of some shops and buses into the main shopping centres of Westcliff itself and Southend-on-Sea.

11. At the hearing it was said that the property was purchased by the Applicant in 1992. Sometime before then, a 2 storey extension had been built onto the back of the house which had a flat roof which was not intended for walking on. It had also been converted into 2 flats with the top flat occupying the first floor of the original house and extension, plus rooms in a loft conversion of the original house only. Oddly, one of those rooms had a door leading out onto the flat roof which had a parapet wall around it about a metre in height.
12. The windows were uPVC. The original part of the house had a pitched, tiled roof with a ridge running from front to back. The flat roof itself seemed to be in reasonable condition but the Tribunal members were able to see inside the top flat and saw evidence of damp in some of the rooms. Some of that damp, particularly on the second floor, was from condensation. However, much of it on the first floor appeared to be under the flat roof, particularly on the left hand side when looking at the property from the road. Having said that there was a very bad patch at the rear corner of the original house on the right hand side in the kitchen.
13. There was a surveyor's report in the papers and a specification of works to be undertaken. It was difficult for the Tribunal members to comment on these. Indeed, much of the suggested remedies could really be described as exercises in speculation as to what may be found when rendering and the parapet wall are removed. The only real evidence as to what is wrong is the damp penetration and some rendering which is cracked. The Tribunal was able to touch some of this and found patches which sounded 'hollow' which was evidence of it having 'blown'.

The Hearing

14. The hearing was attended by Crystal Horwood from the Applicant together with a Martin Ransom who was said to be a branch manager. It is believed that the Applicant is a reasonably large selling agent and property manager in the Southend-on-Sea area.
15. Ms. Horwood said that in 2009 the Applicant's contractor had rebuilt quite a lot of the brickwork to the top of the rear extension and had replaced a lintel to a back door. They had re-rendered some of the walls. The invoice from Elleven Construction in the papers suggests more than this i.e. removing a chimney stack and replacing other lintels. The estimate from the company provided for re-roofing and other work in the total sum of £8,675, whereas the invoice is for only £3,310. That company had undertaken the work but was said to have provided a guarantee of only 5 years which had expired. The invoice makes no mention of a guarantee. The company was not trading any longer.
16. She also said that she had not received a copy of the e-mail from the Respondent and this was read to her. It recorded that a meeting had taken place on the 13th March and the Respondent had agreed to go ahead with the

works. The Respondent said that on the 19th March, she provided details of a contractor nominated by her. She added that she had raised concerns about the standard and quality of the work in 2009 and she had raised issues with the Applicant on 14th October 2012 about cracks appearing in the parapet wall, commenting that if they had been heeded, repair work could have been undertaken under guarantee.

17. Ms. Horwood's reaction to this was to say that they consulted their surveyor both in 2009, as he was then supervising the work, and in 2012, but he did not agree that anything was wrong. In fact this was the same surveyor who had prepared a report in late 2014. The Tribunal asked why the same surveyor was being used but no satisfactory response was received.
18. As to the meeting, Ms. Horwood said that there had been a meeting on the 13th March but the Respondent had wanted to buy the building and agreed to the work being done by the Applicant's contractor. This did not explain why the Respondent had subsequently nominated her own contractor. Ms. Horwood said that this had been someone obtained from the telephone directory. She then went on, somewhat to the surprise of the Tribunal, to say that they were expecting the tender this week but they had only asked a contractor 'associated with' the Applicant. It was said that the Respondent, Mrs. Roberts was 'happy with only one' estimate.

Conclusions

19. 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 matters 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. 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?
20. When the Applicant's statement did arrive, it was made clear that there had been a considerable history and a dispute between the parties. As far as the work was concerned, some work was said to have been done in 2001 which was then virtually repeated in 2009 as described above.
21. The company that did the work in 2009 is not trading and the Applicant appears, from Ms. Horwood's written statement, to be in dispute with the surveyor at the time although, for some reason which the Tribunal could not follow, they were still using him. She says that they have spoken to a structural engineer and a roofing specialist but there are no reports from them. The schedule of works set out in the Applicant's statement is said to have been drawn up 'in conjunction with 3 local builders'. Finally, by way of background, the Applicant is trying to evict its sub-tenant because the first floor of the property will have to be empty for the work to be done. One of the reasons for this application is to ensure that the work is done as soon as vacant possession is obtained.
22. As far as the relationship with the Respondent is concerned, the statement

says:-

“In 2009, we had protracted legal arguments with the other leaseholder and our property was empty for several months. They withdrew their case on the day of the court hearing paying their full share. We have entered this application to try and ensure that we are not in the same position again.

We are happy to work with the other leaseholder so that some consultation can be done. They have now put forward a local builder and we will be getting a quote from them. It is the delays of waiting for the 30 days to pass that we wish to avoid, and we would also like the principal that they are liable for their 50% share agreed in advance”

23. The purpose of these applications is not to avoid consultation when such consultation could take place, or to make sure the work is done as soon as a sub-tenant vacates, or to make sure that a leaseholder pays his or her share of the service charges. If those are the purposes behind this application, then it is an abuse of process.
24. The Tribunal was also concerned with the relationship between the parties. The Respondent’s statement says that she has nominated a builder and Ms. Horwood’s statement, received about a week before the hearing, states that a quote is being obtained from that builder. The first consultation letter has an accompanying letter dated 5th March 2014 (rather than 2015 when it was sent) but it does say that *“we will ask for two contractors to quote”*.
25. In the papers supplied by the Applicant, there is an unexplained quote from MD Roofing Contractors addressed to the structural engineer consulted by the Applicant and dated 19th November 2014 for repairs to the roof.
26. Thus, the Tribunal is in the position that:-
 - it does not know which of the documents produced by the Applicant at the very last minute has been seen by the Respondent, and
 - which of such documents she agrees,
 - it has conflicting evidence as to whether the Respondent knows that only one tender has been requested,
 - it does not know whether the Respondent knows either that her nominated contractor has not been asked to quote or that the Applicant’s nominated company is associated with the Applicant,
 - there is clear evidence that remedial work to this part of the house has been undertaken twice before by this Applicant and on both occasions it does not appear to have been done properly,
 - there is no real explanation as to why the Tribunal’s direction to the Applicant to supply information and evidence well before the hearing was ignored,
 - the only tender will in fact be from a contractor associated with the Applicant and

- there really is no evidence or reason put forward as to why the tender process cannot be undertaken properly save for the reasons stated above which seem to be more focused on protecting the Applicant's financial position from the Respondent rather than anything else. In other words, these are not 'emergency' repairs because the evidence of problems has been there for months.
- The evidence shows that there are 2 areas of bad damage which are not covered by the proposed works i.e. mould in an attic room and the worse area of damp damage which is in the kitchen to the top flat and is not in the extension

27. The Tribunal simply does not know what the Respondent knows or believes. The papers suggest that 2 contractors from the Applicant and 1 from the Respondent are to be tendered, whereas that is not the case. Finally, the only contractor is associated with Applicant. In these circumstances, the Tribunal considers that it is more likely than not that prejudice could be suffered by the Respondent if this application is granted.

28. If the Tribunal is wrong in this conclusion and the Respondent is content for the works to proceed as indicated with the Applicant's contractor, that is a matter entirely for her. The consultation requirements are there to protect a lessee and if she should decided to waive that protection, she can do so.

29. However, the Tribunal should also add that bearing in mind the reasons put forward for the application, the reluctance of the Applicant to provide important information at an early stage when the Tribunal can be sure that the Respondent has seen it, and the change in the Applicant's position in the short time this application has been proceeding, the Tribunal also concludes that this application has been an abuse of process.

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Bruce Edgington
Regional Judge
9th April 2015