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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL



Re: 16 St Mary's Road, Strood, Kent ME2 4DF

Application under Section 20ZA Landlord and Tenant Act 1985

(Application for dispensation from consultation requirements)

DECISION AND REASONS

Case Number: CHI/00LC/LDC/2012/0018

Applicant: Gallient Limited Freeholder

Respondent: Miss N Boorman (Top Flat - First and Second Floor Flat)
Miss C Exall (Flat B – Ground Floor Flat)
Miss S Hendry (Flat C - Lower Ground Floor)

Appearances: Paul Dunford, London Apartment Services (Managing Agent)
Miss N Boorman (Top Flat)

Tribunal Members: Mr R Athow FRICS MIRPM (Chairman)
Mr P A Gammon MBE BA (Lay Member)

Hearing Date: 25th June 2012

Decision Date: 25th June 2012

The Decision

1. The Tribunal determined that dispensation should not be granted.
2. The full reasons for the decision are set out below.

The Application and Proceedings

3. The Application dated 24th May 2012 was made by London Apartment Services, managing agents on behalf of the freeholder, named in the Application as Gallient Ltd.
4. Directions were issued by the Southern Leasehold Valuation Tribunal on 30th May 2012. A Hearing took place on 25th June 2012 at The Court House, The Brook, Chatham.

The Law

5. The statutory provisions primarily relevant to these applications are to be found in S.20ZA of the Landlord & Tenant Act 1985 as amended (the Act).
6. Section 20ZA (1) of the Act states :

'Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the 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 the requirements.'

7. In Section 20ZA (4) the consultation requirements are defined as being :

'Requirements prescribed by regulations made by the Secretary of State'. These regulations are The Service Charges (Consultation Requirements) (England) Regulations 2003 ('the Regulations').'

8. In section 20(2) of the Act 'qualifying works' are defined as being 'works'... 'to the costs of which the tenant by whom the service charge is payable may be required under the terms of his lease to contribute by the payment of such a charge'.

9. If the costs of any tenant's contribution exceed the sum set out in section 6 of the Regulations (which is currently £250) the Landlord must comply with the consultation requirements. The relevant requirements applicable to this application are those set out in Part 2 of Schedule 4 of the Regulations.
10. The Tribunal may make a determination to dispense with some or all of the consultation requirements but it must be satisfied it is reasonable to do so.

The Lease

11. The Tribunal was issued with a copy of the lease of the First and Second Floor Flat and, for the purposes of this Hearing, it is assumed that all leases are in a similar form. The flats are held on 125 year leases from 1st February 1989, with ground rent being due annually on 1st February.
12. The terms setting out the liability for lessees to pay for insurance and service charges are somewhat unusual.
13. Clause 1 of the lease sets out the liability to pay '...a due proportion..' of the insurance premium '...on the next rent day or within 14 days after the expenditure thereof'....
14. The landlord's repairing obligations relevant to this Application are set out in Clause 5(b) which states that the landlord's liability is dependent upon the lessee paying '(... the contribution and payment referred to in sub-clause 4(d) of the lease being made by the lessee)...the lessor will maintain repair clean redecorate and renew the items mentioned in the Fourth Schedule'.
15. The Fourth Schedule, Section 1 states 'The roof roof-timbers chimney stacks gutters rainwater pipes and foundations and external walls of the building'.
16. Clause 4(d) states that the lessee will 'Contribute and pay a one third share of the expenses of managing the property and maintaining cleaning repairing redecorating renewing and keeping tidy and in good order the items mentioned in the Fourth Schedule..... within fourteen days after the expenditure thereof by the lessor.

17. This is contradictory to Clause 5(b) of the lease, and as the lessor was responsible for the drafting of the lease in the first instance, the 'contra proferentem' rule will apply. This means that the lessee will only be liable to pay for expenditure incurred by the lessor in accordance with Clause 4(d)
18. These clauses are not in the normal form found in most leases where the lessee usually pays to the landlord an interim charge from which the lessor pays for the various costs of management and repairs as and when they occur, and then account for the income and expenditure on an annual basis, recovering any shortfall there may be.
19. The result is that in this lease the freeholder must carry out the repairs at his own expense and then seek recovery of this afterwards. Any expenditure in excess of the legislation as explained above is then subject to the Consultation process.

The Inspection

20. Prior to the Hearing the Tribunal inspected the property in the presence of Miss Boorman and her partner Mr Davis.
21. The Tribunal paid particular attention to the interior of the top floor flat and noted the points of water ingress in the rear bedroom. The Tribunal inspected the exterior of the property from ground level with a view to assessing the likely cause of the water leak which is the subject of this application. Directions referred to in this decision are to be viewed from the exterior of the property, i.e. right means the right hand side of the property when viewed from the roadside.
22. The property is a mid-terrace house set over four floors, built about 100 years ago and converted into three self-contained flats some time later. There are brick elevations under a concrete tiled roof. There are parapet walls separating the roofs of adjacent properties, together with substantial chimney stacks.
23. The tenant of the top flat showed the Tribunal the water staining and confirmed the position of the photographs that she had sent to the managing agent upon their request in May 2012. These show the water ingress damage caused solely in this

room. In this room the plasterboard had been removed by the lessee as it had perished due to the on-going water ingress. The Tribunal restricted its inspection and observations to this room and the area of roof above this room as the application had been made solely on the proposed repairs to this area of the building.

24. Unfortunately, the Tribunal was unable to see all of the roof area that is likely to be either the cause, or affected by, this matter. Ideally, the Tribunal would have wished to inspect the roof at close quarters by inspecting from scaffolding.
25. The Tribunal did observe other areas of apparent water ingress but has not taken these into account within the terms of the Applicant's application.

The Hearing

Applicant's Case

26. The Applicant has applied to the Tribunal for dispensation in respect of the requirement to fully consult on major works to the rear roof in order to remedy a water ingress problem. It is the Applicant's submission that, having carried out one repair to the roof in this location at the beginning of this year, the repetition of the defect indicates that a much greater problem exists than was first evident. As water penetrates in to the flat each time it rains the Applicant proposes to undertake the work as a matter of urgency.
27. He has obtained an estimate from the same contractor and enclosed a copy of the estimate with the main bundle of submissions that he sent to the Tribunal under cover of a letter dated 15th June 2012.
28. Normally work that is of this size and cost would need to be the subject of a lengthy consultation process, but in an attempt to bring the property back to a water-tight condition, he is seeking dispensation with his process under Section 20ZA of the Act as detailed above.
29. Within his bundle Mr Dunford enclosed a copy of a letter addressed to 'All lessees' and dated 5th June 2012. It purports to be a Notice of Intention which is the first part of the Consultation process required to comply with Section 20 of the Landlord and Tenant Act 1985 ('the Act'). The works proposed are "Repairs to main roof of flat roof surfaces to repair roof surface caused by penetration of water to top floor flat, work to involve scaffolding to obtain access. Replacement of roof tiles, flashing, *(sic)*". (Note - See paragraph 51 below)

Respondent's Case

30. Miss Boorman was the only lessee to make formal response to this application and attended the Hearing.
31. She was concerned that, having had the same problem about fifteen years ago, which she thought had been dealt with; it should not need to be done again.
32. She stated that the recent problem came to light around Christmas 2011 and she reported this to Paul Dunford, of London Apartment Services on 5th January 2012.
33. LMS Property Services were appointed and they carried out repairs on 19th January, stating that they had had to do some re-pointing and other work. It was raining at the time they carried out the repair.
34. Miss Boorman was unhappy when the leak recurred again in April 2012 and she e-mailed Paul Dunford on 17th April reporting that this had happened.
35. It had taken until 19th May for LMS to return to site and inspect the problem.
36. Miss Boorman stated that she had not received the letter dated 5th June from LAS, nor had she seen or been made aware of the estimate.
37. She had not received a copy of the main bundle that the Applicant had sent to the Tribunal on 15th June and as a result was not in a position to comment on the papers other than to say that she was suspicious that they may not have been sent to her. She intended to speak with the other lessees to ask if they had received any papers.
38. Although she was aware of most of her liabilities under her lease, she felt that she should not be required to contribute to repairs that had already been undertaken and were not remaining effective. Repairs to a roof of the nature previously undertaken should have lasted longer than 15 years.
39. She is on a restricted income and as a result can ill afford the requirement to pay for the works to be done again. She was of the opinion that the previous works were not carried out to a satisfactory standard, and as a result the matter was one for the landlord to resolve at his own expense.

The Consideration

40. The Tribunal were disappointed that there was no representation on behalf of the landlord as is the usual practice under these cases. There were many questions that needed answers and as a result the Applicant has jeopardised his position before the Hearing started.

41. Firstly, there is the question of insurance. In his e-mail of 7th January 2012 Mr Dunford stated that he was unsure if this could be the subject of an insurance claim. There is no evidence that he has made contact with the insurer. This should have been done automatically by the managing agent or the freeholder, whoever deals with the insuring of the building.
42. It is the role of a managing agent to be responsible for dealing with the daily running of the block including the upkeep of the property. This involves regular visits to the property and giving proper instructions to a contractor as well as ensuring that the work is undertaken to a full professional standard. There is a laid down code of practice which has been approved by Government setting out these standards. It appears that these standards have not been adhered to in this instance.
43. It is unsatisfactory that the agent failed to inspect the water penetration in January so that the full extent of the required works could be assessed. This has resulted in a contractor being allowed on site unsupervised and without any firm instruction on what repair to undertake. It appears that the work was a 'quick fix' type of repair rather than a temporary repair to minimise water penetration followed by a more substantial final repair.
44. It is unsatisfactory that the managing agent has again failed to inspect the property immediately after the report was made in April, as failure of a recent repair is a serious matter that needs fuller investigation. As a result he does not have full knowledge of the likely cause of the problem. This inspection should have been undertaken as a matter of the utmost urgency. If he was unable to inspect the property himself he should have instructed a local building surveyor to inspect and give a full written report on the findings together with recommendations. From that inspection a competent surveyor would be able to assess the cause of the defect and prepare a full specification of works that could be sent out to tender.
45. It is not until the Notice of intention was issued on 5th June 2012 that there is any mention of possibly employing a surveyor to prepare a specification. It is clear from this that there has been no suitable technical inspection of the property to assess the full extent of the problem.
46. It is not the responsibility of a contractor to prepare that type of report as they could be seen to be biased in preparing the estimate, or even give an inadequate assessment of the situation, especially from ground level.
47. LMS had carried out a repair in January and yet it failed within three months.

48. The failure of LMS to return to site until one month after the matter was reported in April is unacceptable as it is too long a response time.
49. The latest estimate is too vague to be considered as a suitably reliable document.
50. Turning to the purported Section 20 Consultation papers issued with the letter of 5th June 2012, the Tribunal find them lacking in the details required in that legislation.
51. It would appear that the wording under the heading 'Works proposed' is incomplete as there is a comma at the end of the second line. Even if this should have been a full stop the sentence is incomplete. It mentions flat roofs. There are no flat roof areas which would cause this water ingress. There is no mention of repairs to flashings or chimney stacks which are in the area and could be part of the cause of the water penetration.
52. From the evidence given by Miss Boorman it brings in to question whether or not the Notice of intention was actually served.
53. The lessee's rights to nominate a contractor to be invited to tender are inadequate in detail.
54. It is unclear if the estimate dated 8th June 2012 from LMS was included with the Notice.

The Findings and Reasons

55. Why the repair carried out in January failed has not been ascertained. It is likely that it is due either to the work not being carried out fully, or to an adequate standard. The repair should have been supervised by a competent manager/surveyor. Had this been the case the full extent of the works required would have been found, appropriate action taken, and proper repairs undertaken.
56. The legislation is very clear that the Tribunal has the power to grant dispensation with the Consultation process, but it is not a rubber stamping exercise.
57. The Applicant must have acted professionally in the management of the property and the handling of the subject works.
58. It is unfortunate that the landlord or his agent chose not to attend the Hearing. Had they done so, some of the forgoing matters may have been satisfactorily answered. It is not the role of the Tribunal to second guess the correct interpretation of the papers, either submitted, or those that were not presented.
59. The Tribunal find that in the absence of proof of posting or file records being submitted to the Hearing, that the Notice of intention has not been served in accordance with the legal requirements and therefore is of no effect.

60. Had the issue been dealt with correctly in January it would have been obvious to a competent managing agent that a Section 20 Consultation process was required. It could have commenced this in late January or early February and the full process would have been exhausted by May and the work completed by the date of the Hearing.
61. Taking the foregoing into account it is the decision of the Tribunal not to grant dispensation.
62. The landlord or his agent should have taken adequate steps to assess the full cause of the problem in January 2012 when the problem first recurred. It may have required a Section 20 Consultation process, but the work would have been undertaken to a professional standard at that time.
63. In the alternative, the managing agent should have called the contractor back to remedy the defective workmanship from their earlier attempt at repairing the leak in January.

Signed

Richard Athow FRICS MIRPM

Valuer Chairman

Dated - 25th June 2012