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

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| **Case Reference** | **CHI/45UC/LDC/2013/0025** |
| **Property** | **Olivia Court, Victoria Drive, Bognor Regis West Sussex PO21 2RN** |
| **Applicants** | **Old Estates Limited** |
| **Respondent** | **The Lessees of Flats, 1, 2, 6, 7, 9 & 10 at the Property** |
| **Type of Application** | **S20ZA and S27a of the Landlord and Tenant Act 1985 as amended ("the Act")** |
| **Tribunal Members** | **Judge R.T.A. Wilson (Chair)**<br>**Mr A O MacKay FRICS (Surveyor Member)**<br>**Ms J.K.Morris (Lay Member)** |
| **Date and Venue of Hearing** | **Tuesday 10th September 2013**<br><br>**Tribunal Offices, Chichester** |
| **Date of Decision** | **24th September 2013** |

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**DECISION**

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## Background & Procedural Matters

1. The Tribunal had before it two applications made by the Applicant Freeholder. The first pursuant to S.20ZA of the Landlord and Tenant Act 1985 (as amended) ("the Act") to dispense with the consultation requirements contained in S.20 of the Act in relation to the replacement of an underground water service supply pipe. The second application pursuant to S.27a of the Act was for a determination of the payability and reasonableness of service charges for 2013.

2. The work covered by the S. 20ZA application is described in two documents:

   a) Invoice dated 30th April 2013 from Sussex Renovations Construction Ltd for £1,752 comprising work to locate water leaks and to repair these.

   b) Estimate dated 16th April 2013 from JTS Civil Engineers Ltd for £1,900 comprising the installation of a new common water supply main to the property.

   All of the above are hereinafter referred to as The Works.

3. By an order dated the 28th May 2013 the Tribunal gave directions for the applications to proceed by way of a hearing. The Applicant was directed to serve its statement of case covering both applications and the Respondents were then to serve their statements in response. The Applicant filed a hearing bundle which included a statement of case, but no witness statements. The lessee of flat 7, Mr Leszczynski had written a letter to the Tribunal dated the 6th June 2013, which had been sent to the Applicant, and this letter with the accompanying documents was treated by the Tribunal as his reply. The Tribunal also had before it a letter from Charles Suter the lessee of Flat 6 and the Tribunal took the contents of this letter into consideration in arriving at its decision.

4. The S.27 application appeared to relate to the payability and reasonableness of the estimate from JTS referred to above. However this application was withdrawn by the Applicant at the hearing and the Tribunal consented to such withdrawal upon conditions that appear below.

## Inspection

5. The Tribunal inspected the property immediately before the Hearing in the company of Mr M Paine, a representative of Circle Residential Management, the landlord's managing agents, and Mrs. M Carlton, the lessee of Flat 9, and Mr P Leszczynski, the lessee of Flat 7.

6. Olivia Court comprises two similar purpose built blocks of flats arranged over ground and first floors comprising 10 flats in total. The property is situated on level ground in a well established residential district of Bognor Regis.

7. The Tribunal's attention was drawn to the position of the underground water pipe supply serving the southerly block of flats known as Flats 1-4, and more particularly delineated on the plan in the Hearing bundle.

8. The water service supply had been renewed earlier in the year, but final making good remained outstanding around the area of the stopcocks where the ground remained in its excavated form pending reinstatement and the relaying of the paving slabs.

## The Law

9. By section 20 of the Act and regulations made thereunder, where there are qualifying works or the lessor enters into a qualifying long term agreement, there are limits on the amount recoverable from each lessee by way of service charge unless the consultation requirements have been either complied with, or dispensed with by the Tribunal. In the absence of any required consultation, the limit on recovery is £250.00 per lessee in respect of qualifying works, and £100.00 per lessee in each accounting period in respect of long term agreements.

10. As regards qualifying works, the recent High Court decision of *Phillips v Francis*[2012] EWHC 3650 (Ch) has interpreted the financial limit as applying not to each set of works, as had been the previous practice, but as applying to all qualifying works carried out in each service charge contribution period.

11. A lessor may ask a Tribunal for a determination to dispense with all or any of the consultation requirements and the Tribunal may make the determination if it satisfied that it is reasonable to dispense with the requirements (section 20ZA). The Supreme Court has recently given guidance on how the Tribunal should approach the exercise of this discretion: *Daejan Investments Limited v Benson et al* [2013] UKSC 14. The Tribunal should focus on the extent, if any, to which the lessee has been prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the lessor to comply with the regulations. No distinction should be drawn between serious or minor failings save in relation to the prejudice caused. Dispensation may be granted on terms. Lessees must show a credible case on prejudice, and what they would have said if the consultation requirements had been met, but their arguments will be viewed sympathetically, and once a credible case for prejudice is shown, it will be for the lessor to rebut it.

## The Hearing

12. Mr Paine led the case for the Applicant by summarising the background to the application in the following way:

13. On the 9th April 2013 the managing agents recorded having been contacted by the tenant of Flat 2 a Mr Warland who had reported a water leak. On the 12th

April 2013 Sussex Renovations were instructed to carry out a track and trace exercise to establish the cause of the leak and to carry out the necessary repairs. Sussex Renovations attended the property over the weekend and although they had carried out six repairs to the underground pipe it had not been possible to carry out a permanent repair. Accordingly a second and more specialised contractor had been instructed to estimate to replace the pipe work, which had clearly come to the end of its useful life. Their estimate came to £1,900 plus vat. Sussex Renovations were also asked to estimate for the necessary work and their estimate came to £3,371 plus vat.

14. The Applicant had then initiated the first stage of the consultation exercise by serving a notice of intention on each lessee. However as in their judgment the work was of an urgent nature they had instructed JTS, who had submitted the lowest estimate, to carry out the work even though the consultation exercise had not been completed. Most of the Work had been completed by the end of April 2013.

15. Mr Paine suggested that it simply was not open for the Applicant to wait up to three months before replacing the water supply. In any event Circle management had obtained two independent quotations for the necessary work and therefore they had in effect undertaken consultation albeit reducing the time scales. The Applicant had not received any contractor nominations from any lessee prior to instructions being given to JTS to undertake the replacement piping.

16. Mr Paine suggested that as none of the lessees could demonstrate any prejudice because of the Applicant's failure to consult, the Tribunal was in a position to grant the application to dispense in respect of the Works.

17. Mrs Carlton and Mr Leszczynski had essentially the same points to make in support of their opposition to the application. Firstly they disputed that there was any real urgency in the works, or in so far as there was urgency it had come about because of the failure by the Applicant to act promptly as they had been aware of the problems back in January 2013. At that time they had been advised of the leak but had done nothing about it until April 2013. Therefore any urgency was entirely of their own making. Their second line of argument was that it should not have been necessary for two contractors to be involved in carrying out work. Sussex Renovations did not have the necessary expertise to complete the work and therefore they should not have been instructed in the first place. They contended that if one competent contractor had been engaged in the first place then the cost would have been less. Finally the Works had still not been properly finished off and they feared that they would be subjected to further charges in due course. This was not satisfactory.

## Consideration

18. In the opinion of the Tribunal the Works do constitute "qualifying works" within the meaning of the Act. As the contribution required from the Respondents pursuant to the service charge provisions in their leases will exceed the threshold of £250, there is an obligation on the Applicant under

Regulation 6 to consult in accordance with the procedures set out in the Regulations.

19. The evidence put before us establishes: -

(i) The work to trace and seek to repair the water leak was necessary and proportionate.

(ii) The investigations carried out by Sussex Renovations revealed that the underground water supply pipes, serving the building, was in an advanced state of corrosion necessitating full-scale replacement rather than patch repairs.

(iii) The first stage of consultation has already been carried out and there have been no contractor nominations from the Respondents.

20. The Tribunal first considered the terms of the leases and in particular the repairing covenants contained therein. The leases provide in summary for the landlord to repair the structure of the Building and the Development that is defined to include the service media, which in the judgment of the Tribunal encompasses the underground water pipe, which is the subject matter of this application. The leases all contain the usual service charge clauses and in particular there is an obligation on the part of each lessee to contribute towards the costs incurred by the landlord in maintaining and repairing the Building and Development. The Tribunal is thus satisfied that the Applicant is obliged to carry out the Works and the Respondents are obliged to contribute towards the cost of the Works by virtue of the service charge provisions of the leases.

21. The Tribunal is also satisfied that the Works needed to be carried out to ensure a continued water supply to the flats and to avoid damage to the structure of the building, which would have materialised had the Applicant engaged with the full three month consultation exercise before commencing the Works.

22. The Tribunal noted the Respondents' allegations that the Applicant had been tardy in carrying out the work but these allegations rested simply on hearsay evidence. Neither Mrs Carlton nor Mr Leszczynski had any direct knowledge of when the Applicant or their managing agents had first been made aware of the problems. Mrs Carlton accepted that she had made no contact with the agents herself and that it was the tenant of Flat 4 that had told her that the Applicant had been contacted in January 2013. However there was no other evidence to support these allegations and they are not upheld. The only hard evidence in the hearing bundle relating to timing is a copy of a maintenance request form from the managing agents dated the 9th April 2013. This makes reference to a leak in a water pipe behind the block of 1-4 with the water leaking out onto the paved area. This form does not in its self demonstrate one way or another when the Applicant first became aware of the water leak but it does demonstrate that after the 9th April 2013 the managing agents moved fast in their efforts to deal with the matter.

23. The Tribunal also considered the submissions of Mrs Carlton and Mr Leszczynski supported by Mr Coter in his written submissions that it should not have been necessary for two contractors to be engaged in the same work and that the involvement of two contractors has necessarily increased the overall cost. The Tribunal is not persuaded by these arguments and considers that it was not unreasonable to engage a general contractor to ascertain the cause of the problem and to effect repairs if possible. Had the general contractor been able to affect a permanent repair it is at least possible that the cost would have been less that engaging a more specialist contractor at the outset, which may have had a higher hourly charge out rate. In any event in accordance with *Daejan Investments Limited v Benson et al* [2013] UKSC 14 the Tribunal must focus on prejudice. The works charged for relate to different aspects of the same disrepair and there is no evidence to suggest that doing them together by one contractor would have saved money. Indeed there is no cogent evidence that the Respondents are being asked to pay for inappropriate work, or more work than was actually done, or are being charged inappropriate amounts. Any prejudice would therefore seem to be entirely speculative.

24. The submissions made by Mrs Carlton and Mr Leszczynski, that the quality of the Works is poor, is noted by the Tribunal. Certainly the Works are not yet complete and bearing in mind the content of the estimates, which contain a fixed price to complete the Works, the Respondents have a reasonable expectation that they will not be charged further for the job to be finished. If the Respondents are not happy that value for money has been obtained they may perhaps wait until the Works are complete before deciding if they wish to challenge the resultant service charge, which they will be able to do by making an application to the Tribunal under S. 27a of Act.

25. However, on the application currently before the Tribunal 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 consultation requirements of S.20 (1) of the Act in respect of the Works and it so determines.

26. 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 S.20 of the Act. It does not prevent an application being made by the Respondents under S.27A of the Act to deal with the resultant service charges. It simply removes the cap on the recoverable service charges that S.20 would otherwise have placed upon them.

27. The Tribunal records an undertaking given on behalf of the Applicant at the hearing in the following terms: in the event of the Respondents making an application to the Tribunal pursuant to S20C of the Act to prevent the Applicant's costs incurred in the S20ZA application forming part of the service charges for the building then this application would not be opposed.

28. Finally the Tribunal records that it received notice at the hearing from the Applicant that its application under S. 27a of the Act was withdrawn. The Tribunal granted its consent to such withdrawal on two conditions. The first

that the Applicant's managing agents send notice of withdrawal to all Respondents within 7 days of the hearing and the second that the Respondents will not be charged for any of the costs incurred by the Applicant in relation to the S 27a application and its withdrawal.

## Appeals

29. 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.

30. 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.

31. 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 the time limit, or not to allow the application for permission to appeal to proceed.

32. 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.

33. If the First-tier Tribunal refuses permission to appeal, in accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007, and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the Applicant/Respondent may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.

Signed_____
Judge RTA Wilson

Dated 24th September 2013