



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

Case Reference : **BIR/17UH/LDC/2020/0005**

Properties : **Flats 1 to 21 (excl 13), 8 Eagle Parade, Buxton,
SK17 6EQ**

Applicant : **Hydes Brewery Limited**

Representative : **TLT LLP**

Respondents 1 : **The leaseholders of Flats 1 to 21 (excl 13), 8 Eagle
Parade, Buxton**

Respondent 2 : **Freehold Properties 43 Limited**

Representative : **Edge Property Management Limited**

Type of Application : **An application under section 20ZA of the Landlord
and Tenant Act 1985 for dispensation of the
consultation requirements in respect of qualifying
works.**

Tribunal Members : **Judge T N Jackson
Ms A Rawlence FRICS**

Date of Hearing : **28th October 2020**

Date of Decision : **16th November 2020**

DECISION

Decision

To the extent that the statutory consultation requirements prescribed by the Service Charges (Consultation Requirements) (England) Regulations 2003 were not complied with by the Applicant in relation to the qualifying Works carried out to 8 East Parade, Buxton from 11th September 2020 which are the subject of this application, those requirements are dispensed with.

Reasons for decision

Introduction

1. By application dated 9th July 2020, the Applicant applied for a dispensation of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 ('the 1985 Act').
2. The application relates to major works comprising the replacement of roof coverings (including battens, felt and leadwork) together with remedial works to rainwater goods, re-rendering, masonry and decoration with some elements of internal repair following water ingress ('the Works').
3. Directions were issued on 22nd July 2020. Direction 6 required any Leaseholder who objected to or supported the application to notify the Tribunal and the Applicant by 9th September 2020 together with the reasons/grounds relating thereto.
4. The Applicant's response to the Directions was received on 20th August 2020. The Leaseholder of Flat 7, Mr Andy Laver, objected to the application and in an email of 9th September 2020 provided his reasons for such objection. Further Directions were issued on 19th October 2020 obtaining further information from the Applicant regarding details of consultation procedures carried out in 2019 and 2020. The Applicant responded on 23rd October 2020 and provided a 736 page bundle split over 3 parts ('the bundle').

Background

5. The Applicant is the freeholder of the 8 Eagle Parade, Buxton. The premises are let to Respondent 2 by a Lease dated 8th December 1999. Respondent 2 lets 20 flats in the premises to Leaseholders, (Respondent 1), by way of sub leases. The Applicant is the Head Lessor and its only tenant is Respondent 2.
6. By Clause 1 of its Lease, Respondent 2 covenants to pay by way of service charge 57% of the amount which the Applicant shall expend in observing the Lessor's covenants in clause 6 of the Lease.
7. Since at least 2017 there has been an ongoing issue in the premises of water ingress internally to the flats and service corridors to suggest that the roof has failed in a number of areas. There are areas within some of the flats showing signs of water ingress and cold bridging through the external fabric that are causing salt efflorescence, rot and black mould.

8. A Condition Survey was carried out in March 2018 by Cube PSL, project managers instructed by the Applicant. The proposed Works were 'qualifying works' for the purposes of section 20 of the 1985 Act. As no public notice of the Works was required to be given, the consultation requirements in respect of the Works were those specified in Part 2 of Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 ('the 2003 Regulations'). In 2019, a consultation process in respect of the Works was undertaken in conjunction with Respondent 2.
9. A Notice of Intention to undertake qualifying works was given to the tenants on 28 February and 1 March 2019. A tender process was undertaken by Cube PSL on behalf by the Applicant. The tenant of flat 4 nominated a contractor who was invited to tender but declined to do so. On or around 6 September 2019, a Statement of Estimates was served on the tenants which provided estimates from two contractors. and stated that the consultation period would end on 6th October 2019.
10. Ultimately the Works could not be undertaken in 2019. The Applicant says that it was not considered possible to carry out work in the winter months. Further, between November 2019 and May 2020 there were ongoing conversations between the Applicants and Edge Property Management Ltd, (the agents for Respondent 2), about the provision of funding for the Works. Those conversations came to an end in May 2020 without an agreement.
11. The Applicant was of the opinion and were advised by Cube Ltd that the Works were urgent given that further deterioration was likely should the premises remain in their current state for a further winter season. Whilst some internal works had been carried out which had improved appearance, those works had not addressed the cause of the issue and no substantial external works were undertaken between the photographs of March 2018 and the making of this application. The Applicant was seeking to ensure that the range of issues at the premises were addressed as a whole and not single out particular defects one at a time resulting in a drawn out programme of works which would allow further deterioration to occur.
12. Because of the effluxion of time since the last tender process, changes in the identity of some tenants, and further deterioration to the premises, it was considered necessary to re-consult and re-tender the Works.
13. A further Notice of Intention to carry out the Works was given to the tenants at or around 3rd July 2020 and stated that the consultation period would end on 3rd August 2020.
14. The application to the Tribunal for dispensation was made on a protective basis on 9th July 2020 in order to ensure that the Works could commence in time before winter 2020 even if the consultation process had not yet been completed.
15. The tenants of Flat 14 nominated a roofing contractor who was contacted on or around 22nd of July 2020 and invited to tender with a tender return date of the 7th of August 2020. On 6th of August 2020, the contractor confirmed that he was unable to submit a tender due to current workloads.
16. Within the consultation period, emails were received from three tenants, none of which contained observations relevant to the proposed Works.

17. On or around the 11th of August 2020, the tenants were served with a Statement of Estimates in relation to the proposed Works. The Statement specified that the consultation period would end on 10th September 2020.
18. The tenants were invited to make observations in writing in relation to the estimates within the relevant period. Observations were received from various tenants. The tenants of flat 5 sought to nominate their own in-house scaffolding company as a contractor but the nomination was submitted on 9th of September 2020 and was too late to be considered as part of the tender process.
19. The estimates were made available for inspection by appointment and the tenants were notified of the same. None of the tenants contacted TLT to arrange an appointment. On 7th September 2020, Caroline Timperley, a representative of the tenant of Flat 5 requested copies of the estimates which had by then already been provided to the Respondents under cover of the application to the Tribunal and of which she was so advised on 8th September 2020.
20. On 13th of October 2020 a Notice of Reasons was served on the tenants (although strictly unnecessary as the contractor whose tender was accepted had supplied the lowest estimate). That Notice summarized the Applicant's response to the observations received throughout the consultation process, to which they had had regard.
21. Between the 9th of July 2020 and the date of the hearing, in parallel with the Tribunal application, with the exception of paragraph 4 (10)(a) of Part 2 of Schedule 4 of the 2003 Regulations ('paragraph 4(10)(a)') the consultation requirements had been complied with.
22. Scaffolding was erected at the premises on or around 11th September 2020 after the second consultation period had closed. By the date of the hearing, work had commenced.

Hearing/Inspection

23. Neither party requested an inspection. The Applicant's Statement of Case received on 20th August 2020 contained 57 photos of the exterior and interior of the Properties. Mr Laver had not disputed the photographic evidence although had commented that more up to date photos were available. In the light of the current Public Health Epidemic, having had regard to the lack of request for an inspection and the photographic evidence, we were satisfied that we could determine the matter without an inspection.
24. The hearing took place remotely via video. The hearing was attended by Mr T Boncey of Counsel and Mr Forrest of TLT LLP on behalf of the Applicant and Mr Laver of Flat 7, a Respondent, who objected to the application.
25. Mr Boncey and Mr Laver had copies of the bundle provided by the Applicant in response to the Directions dated 19th October 2020. Mrs Rawlence had received one part of the three-part bundle whilst Judge Jackson had not received any of the bundle.

26. It was established that the bundle contained many duplicates as it included copies of the same documents sent to each of the 20 leaseholders. Pages 1- 180 of the bundle comprised documentation previously provided to the Tribunal and which we therefore had available. After discussion with the parties, it was agreed that the Applicant would provide the Tribunal, via email, for immediate use at the hearing, with a pdf extract of the bundle to include documents demonstrating each step of the 2019 and 2020 consultation procedures limited to two or three leaseholders. This comprised 85 pages. The pdf extract was cross referenced to the pagination in the bundle to ensure that the parties and the Tribunal were looking at the same documents when being directed to the documentary evidence and that the Tribunal could note the appropriate pages to assist when they received the full bundle.
27. We advised that despite having heard the submissions and evidence at the hearing, we would not make a decision until we had received and read the full bundle. Once received, we would seek clarification of any outstanding issue by writing to the parties. We confirm that we have now received the full bundle and have had the opportunity to read it in full. We do not require clarification of any issues. We thank the parties for their assistance and flexibility regarding the practical arrangements adopted which allowed the hearing to continue in the absence of the bundle but without compromising fairness

The Law

28. The only issue for determination is whether we should dispense with the statutory consultation requirements.
29. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements “if it is satisfied it is reasonable to do so”.
30. The proper approach to the Tribunal’s dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. Lord Neuberger PSC held that:
- 1) Sections 19 to 20ZA of the 1985 Act are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. (at [42])
 - 2) Given that the purpose of the consultation requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, the issue on which the FTT should focus when entertaining an application under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements.(at [44])
 - 3) Prejudice to the tenants from any breach of the requirements is the main, and normally the sole question for the FTT in considering how to exercise its discretion under section 20 ZA (1) (at [50])

- 4) The factual burden is on the tenant to identify any relevant prejudice which he claims he would or might have suffered. It is not appropriate to infer prejudice from a serious failure to consult. (at [67])
 - 5) In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason. (at [45])
 - 6) Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). (at [46])
 - 7) The FTT can grant a dispensation on such terms as it thinks fit, provided that they were appropriate in their nature and effect, including terms as to costs. (at [54]).
31. It is important to note that the present application is concerned **only** with the issue of whether it is reasonable to dispense with the consultation requirements so that in principle, the Applicant can recover from Respondent 2 57% of the costs of the Works under the terms of the Lease. Any subsequent 'passing on' of any portion of those costs by Respondent 2 to Respondent 1 (the 20 leaseholders) would be determined by the relevant provisions of the respective Leases. A determination by the Tribunal that the consultation requirements should be dispensed with **does not** preclude an application under section 27A of the 1985 Act to determine whether the relevant contribution is payable at all under the terms of a Lease or whether the relevant contribution is reasonable.

Preliminary application

32. Mr Laver applied to admit late evidence, a copy of which we received on the morning of the hearing. He had been unable to provide it earlier as he had had difficulty obtaining, dating and collating information from several different leaseholders. Mr Boncey objected to the late admission as he submitted that it was not relevant to the issue before us.
33. We reviewed the documentation and noted that it comprised email correspondence regarding historical complaints by Respondents 1 dating back to 2016; photos of the disrepair of the exterior and interior ranging from 2015 to 2020 and a short video of vegetation growing in displaced roof slates in August 2020.
34. We determined not to allow the admission of the late evidence. Whilst possibly of relevance to an application under section 27A of the 1985 Act, it was not relevant to the issue before us which related solely to whether it was reasonable to dispense with any or all of the statutory consultation requirements.

Submissions

Respondent 1

35. In his letter of objection, Mr Laver submits that:

- i. The application misstates the history of decay and mismanagement contributing towards the decay;
 - ii. The application misstates the level of consultation held with individual leaseholders;
 - iii. There has been no attempt to consult with or inform leaseholders as a group, to enable them to collectively question and assess assumptions, plans and
 - iv. The Applicant has not obtained sufficient estimates for works of such magnitude (both in absolute terms but also relative to the value of the flats contained in the building) for the rationale for total expenditure.
36. Mr Laver states that the photographs supplied with the application are out of date and do not represent accurately the state of the building now and therefore the case for the 'sudden and immediate need for dramatic action is therefore overstated'.
37. Mr Laver asserts that he has been prejudiced by the delay in the Works being carried out which has resulted in the scope of works being extended, thus increasing the costs. He asserts that the 2020 quotes are 17% higher than the 2019 quotes.

The Applicant

38. In relation to the grounds of objection, Mr Boncey submits that:

- i. Alleged historic mismanagement of the premises by any party, including the Applicant, Respondent 2 and the latter's agents is irrelevant to the question of whether it would be reasonable to dispense with the consultation requirements in respect of the Works now being undertaken;
- ii. The 2019 consultation was carried out in accordance with the requirements of statutory consultation. Landlords are not required to consult beyond the statutory requirements. Further, the extent of the 2019 consultation is not determinative of the issue before the Tribunal which relates to the 2020 consultation;
- iii. There is no statutory requirement to consult the leaseholders as a group as there is no recognized tenant's association. It is not part of the statutory purpose of the consultation requirements to encourage the formation of recognized tenant's associations or to stimulate communication between the tenants: *OM Property Management Ltd [2014] UKUT 9 LC at [44]*;
- iv. The 2003 Regulations do not require more than two estimates to be obtained. Further, the Applicant tried to obtain an estimate from a roofing contractor nominated by the leaseholders of Flat 14 but the contractor was unable to do so due to their workload. The Applicant has no incentive to pay more than unnecessary or to undertake unnecessary works given that it will bear 43% of the costs under the terms of the Lease.

39. In relation to the photos, whilst it is accepted that more recent photos of the flats show that some internal works have been undertaken since 2nd March 2018, that does not detract from the need to undertake the Works. The Works cover a range of external issues to ensure that the building is addressed as a whole. No substantial

external works had been undertaken between the date of the photographs in March 2018 and the date of the application. Cube PSL had attended the premises on a number of occasions since the March 2018 photographs were taken in order to draw up an up to date and reliable scope of work upon which the tender process was based.

40. Mr Boncey accepts that there was a failure to strictly comply with an element of paragraph 4 (10)(a), namely that the tenants be notified of the place and hours at which the estimates may be inspected. Paragraph 2 requires the estimates to be available for inspection, free of charge, at that place and during those hours. The Notice stated that the estimates were available for inspection by contacting TLT LLP to arrange an appointment. He says that this deviation related to the need for social distancing under the current Public Health Epidemic. None of the tenants contacted TLT to arrange an appointment. The tenants had received copies of the estimates under cover of the application to the Tribunal.
41. Mr Boncey submits that it has not been suggested by any tenant, and there is no evidence to suggest, that strict compliance with the requirements of paragraph 4 (10)(a) would have made any difference to the placing of the Works, or that any tenant would have sought to inspect the estimates who did not request them via email. The lowest estimate was selected. Therefore, even had there been any lack of opportunity to inspect the estimates (which he says there was not), this would not have resulted in any prejudice to the tenants.
42. Mr Boncey submits that Mr Laver's grounds of objection are not relevant to the issue before us and that they do not reveal any good reason for us to refuse to dispense with the consultation requirements. He submits that Mr Laver has not suggested that any prejudice has been caused to tenants by any failure to comply with paragraph 4 (10)(a) or by any other failure to comply with the consultation requirements. He submits that the extent, quality and cost of the Works have been unaffected by any failure to comply with the consultation requirements. There is no evidence that the tenants have suffered any disadvantage which they would not have suffered if the consultation requirements had been fully met. He submits that the test for dispensation set out by Lord Neuberger in *Daejan Investments v Benson* [2013] 1 WLR 854 is satisfied.

Agreement during the hearing

43. With the exception of paragraph 4 (10) (a) in relation to the 2020 consultation, Mr Boncey adduced the documentary evidence to demonstrate that each step of the statutory requirements had been met in relation to both the 2019 and 2020 consultations. Mr Laver accepted that was the case and that, with the exception of paragraph 4 (10)(a) there had been no failure to comply with the statutory requirements.
44. Mr Laver said that he had not been caused any prejudice by the Applicant's failure to comply with paragraph 4 (10)(a).

Deliberations

45. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. With the exception of paragraph 4 (10)(a) of Part 2 of Schedule 4 of the 2003 Regulations, the statutory consultation requirements have been complied with;
 - ii. Mr Laver accepts that, with the exception of paragraph 4 (10)(a), there has been no failure to comply with the statutory consultation requirements;
 - iii. We accept that, due to the current epidemic the requirement to make an appointment to allow inspection of the estimates was a reasonable approach. Having regard to the facts set out at paragraph 41, we are satisfied, and Mr Laver agrees, that he has not suffered any prejudice arising from the failure to comply with paragraph 4 (10)(a).
 - iv. The majority of Mr Laver's submissions relate to matters that ought more properly to be considered under an application under section 27A of the 1985 Act to determine whether a relevant contribution to the cost of the Works is payable at all and/or whether a relevant contribution is reasonable.
 - v. If the works are not carried out urgently and before the winter months, there is a high risk that the Works will have to be delayed to a future date when the weather is more suitable and there will be continued water ingress and further damage to the premises, both internally and externally.
 - vi. The Applicant's tenant, Respondent 2, has made no observations about the Works and has made no objection to the application. Respondent 2 will suffer no prejudice as a result of the consultation requirements being dispensed with.
 - vii. We do not consider that Respondents 1 or 2 are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements in relation to the outstanding requirement.
46. The Tribunal therefore determines that, to the extent that the statutory consultation requirements prescribed by the 2003 Regulations were not complied with, the consultation requirements are dispensed with in relation to the replacement of roof coverings (including battens, felt and leadwork) together with remedial works to rainwater goods, re-rendering, masonry and decoration with some elements of internal repair following water ingress ('the Works').

Appeal

47. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson
15th November 2020