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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/33UB/LDC/2016/0022**
Property	:	**Queens House, Queens Square, Attleborough, NR17 2AF**
Applicant	:	**Planmark Properties Ltd.**
Respondents	:	**Stephen Phillipp Litten and Maria Louise Litten**
Date of Application	:	**1st November 2016**
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)** **David Brown FRICS**

DECISION

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1. The Tribunal grants dispensation from the full consultation requirements in respect of works undertaken to the property for general exterior maintenance and repairs including checking and maintaining the roof, re-pointing, replacement of defective timbers and redecoration works. This dispensation is granted upon the conditional that none of the Applicant's costs in respect of this application shall be paid by the Respondents.

Reasons

Introduction

2. This is an application for dispensation from the consultation requirements in respect of 'qualifying works' to the property. It is clear from the papers that (a) there is conflict between the parties and (b) the parties and their legal representatives do not seem to fully understand the purpose of an application for dispensation from the consultation requirements. Simple examples of this are:

    - The application says that the case involves a qualifying long term agreement. There is no evidence that it does.

- There is argument about when the freehold interest transferred from Philip Southgate to the Applicant. This is irrelevant as both parties accept that the Applicant is the present freehold owner.
- The Applicant asks for an order for costs. This is surprising as (i) proceedings in this Tribunal do not involve costs consequences unless unreasonable behaviour in the conduct of such proceedings is involved (none has been alleged or is evident) and (ii) if, as is clear by implication at least, the Applicant has failed to comply with the consultation provisions, then it is the Applicant's behaviour which is in question.
- There are arguments about the reasonableness of the cost of the works which are irrelevant to this application because there is no application under section 27A of the 1985 Act. Having said that, and as a matter of comment only, the copy invoice supplied is for a figure substantially more than the tender figure. This may involve professional fees but will have to be explained in detail to the Respondents if that has not already happened.
- The Respondents assert that it was wrong of the landlord to suggest that the commissioning of the works in question was entirely within the remit of the landlord i.e. that the Respondents should have been able to obtain and rely on 'alternative quotes'. That is not the case.

3. Both parties appear to be professional property owners. The Respondent, Mr. Litten, has filed a statement saying that he is "*an experienced property developer and owner of a number of properties which are let and leased which I retain for investment purposes. As such I am fully aware of the costs of works and the extent of works required to maintain similar buildings with a need to ensure that those works are carried out within the parameters of the service charge provisions within the leases.*" This building contains 4 flats and commercial premises occupied by Barclays Bank PLC which are presumably on the ground floor. Leasehold interests in the 4 flats are owned by the Respondents.

4. A procedural chair issued a directions order on the 28th November 2016 timetabling this case to its conclusion. The Tribunal indicated that it would deal with the application on the basis of written representations and the appropriate notice was given to all parties for a determination on or after 13th January 2017 with a proviso that if anyone wanted an oral hearing, then arrangements would be made for this. Similarly, the Tribunal did not consider than an inspection would be necessary but offered the facility of an inspection. No request was made for either an inspection or an oral hearing.

The Law

5. Section 20 of the 1985 Act limits the amount which lessees can be charged for major works involving a cost of more than £250 to each tenant 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 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.

6. 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.

7. Section 20ZA of the 1985 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.

Discussion

8. 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 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?

9. The Respondents contest this application upon the basis of representations put forward by Mr. Litten, namely that the consultation procedures were not complied with and they have suffered prejudice "*by not being given a proper opportunity to put forward an alternative contractor whom I believe from my extensive experience would have tendered a figure of no more than 85% of the accepted tender £29,060.73*". The Respondents say specifically that they agree that the specification of works "*is not unreasonable*". It is merely the ultimate cost that they dispute.

10. The Tribunal has therefore looked at the evidence to see what actually went on at the time. The first relevant communication is a letter written by Paul Robbins MRICS from Merrifields as managing agents for Philip Southgate, the then owner of the building, explaining that the building is in disrepair and offering to liaise with the Respondents about necessary works. The letter is dated 7th July 2014 and says "*I am more than happy to work with you to ensure that the works are competitively priced and cause as little disruption as possible for your tenants*".

11. There is then an e-mail from Karen Broom to Mr. Robbins, claiming to act on behalf of Stephen Litten dated 14th July from which it seems clear that Mr. Litten is at least aware of the communication from Mr. Robbins. The e-mail refers to the fact that verbal quotes have been obtained for these works and written confirmation is awaited. Mr. Litten's evidence says "*...I was not aware of my right within the regulations to put forward my own contractor's name. Indeed at the appropriate time my wife and co-owner was in hospital in a critical condition and I had to leave this matter in the hands of my personal assistant*". The assistant is not named but it seems clear that it was Karen Broom.

12. The next relevant communication is a further e-mail from Mr. Robbins to Ms.

Broom dated 16th July 2014 which says "*...a purpose of my letter was to confirm that once a spec is prepared I am will be* (sic) *pleased to liaise with Mr. Litten and it may be useful for him to sourse quotes should he so wish*". This message is in reply to one from her in which she says that Mr. Litten "*is sourcing quotes from contractors he knows which we can then compare with quotes you receive*".

13. The documents supplied contain a letter from Mr. Robbins to Ms. Broom dated 31st October 2014 enclosing the specification prepared by a company/firm called Woodfellows. The letter says "*As discussed back in July, please do let me know of you* (sic) *would like Woodfellows to invite a tender from a particular contractor of your choice. Otherwise I understand the intention is for Woodfellows to approach three contractors (not connected with my client) for quotations*". Mr. Litten, in his statement, says that he did not receive that letter and has doubts that it was sent to him.

14. Finally, in terms of documents relevant to the issues, is an e-mail from Mr. Robbins to Ms. Broom dated 5th November 2014 saying "*following on from my e-mails below and letter of 31 October setting out my client's intention to carry out the 'qualifying works', I should add that I (or Simon) will be pleased to discuss the proposed works in detail with you/Mr & Mrs Litten should that be helpful*".

15. Following the **Daejan v Benson** case referred to above it is really for a lessee to establish that prejudice has been suffered as a result of a failure to comply with the consultation rules. Having said that, the burden of proof is not that great because consultation is a statutory requirement. In this case, it seems from Mr. Litten's evidence that (a) in 2014, Mrs. Litten was very ill in hospital and all the day to day administration relating to this matter was undertaken by the assistant, Ms. Broom, (b) Ms. Broom clearly seems to have been aware that the works were proposed and that Mr. Litten had obtained verbal quotes, (c) Ms. Broom was told on the 5th November that the letter dated 31st October 2014 had been sent enclosing the specification and asking for contractors from whom tenders could be obtained. She does not appear to have raised any query about this letter or whether it had been sent.

Conclusions

16. These works were clearly necessary and the Respondents agree with the specification prepared on behalf of the then freehold owner, Mr. Southgate, who is a director of the Applicant. It is for the Applicant to maintain the structure of the building and recover the cost from the lessees. It appears to be the refusal to pay for the works which prompted this application.

17. On the evidence presented, the Tribunal is satisfied that the letter of the 31st October 2014 was sent and received by Ms. Broom and that she was the authorised representative of the Respondents. Thus, even if the Respondents themselves were not fully aware of what was going on, they had deemed knowledge of the fact that they could nominate their own contractors. In his statement, Mr. Litten says "*The Applicant's surveyor rebuffed the suggestion made by my personal assistant on my behalf that we obtain alternative quotes in his e-mail of 16th July 2014 indicating strongly that it was not our business to do so but entirely within the landlord's remit*". Whether Mr.

Litten likes it or not, that is in fact the case i.e. it is solely the landlord's task to arrange for the works. All a landlord has to do is offer the chance for the lessee to nominate contractors from whom the landlord can obtain tenders, and to take the lessee's submissions into account at each stage in the process.

18. As has been indicated, it should be made clear that this is not an application for the Tribunal to determine whether the costs incurred are reasonable and it does not do so. Having said that, if the Respondents want to challenge the reasonableness of the costs in any subsequent application to this Tribunal, they will need to provide some clear evidence that in the circumstances faced by the Applicant, the cost of the works would have been significantly different from the evidence produced to this Tribunal. For example, Mr. Linden says that he has made enquiries and asserts that the cost should have been lower. He provides no evidence of this. As his case is based solely on the assertion that the cost is too great, the Tribunal concludes that if such evidence had been available, it would have been produced.

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Bruce Edgington
Regional Judge
16th January 2017

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.