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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UG/LDC/2016/0034**
Property	:	**The Sea House** **2 Herbrand Walk** **Cooden Beach** **Bexhill-on-Sea** **TN39 4BW**
Applicant	:	**Sea House Cooden Beach Ltd**
Representative	:	**Carlton Property Management Ltd**
Respondents	:	**The Lessees of 15 flats listed in the application**
Type of Application	:	**Dispensation from Consultation** **Section 20ZA Landlord and Tenant Act 1985**
Tribunal Member	:	**Mr BHR Simms FRICS (chairman)** **Mr AO Mackay FRICS (surveyor member)**
Date of Hearing	:	**17 October 2016 – documents only**
Date of Decision	:	**16 November 2016**

DECISION

DECISION OF THE TRIBUNAL

1. The Tribunal refuses the Applicant dispensation from the consultation requirements in respect of the proposed works to balconies at the Property.

THE APPLICATION

2. The application dated 04 August 2016 is for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 ("the Act") in respect of proposed balcony repairs at the Property.

3. On 30 August 2016 the Tribunal directed that the application is to be determined on the papers without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 and no party objected to this procedure. The Tribunal proceeded to determine the case on papers alone without a hearing.

4. The Applicant was directed to send the formal Directions to each leaseholder and to confirm that this had been done. The Tribunal received confirmation on 05 September 2016.

5. The Tribunal directed the Respondents to indicate whether they agreed with the Application and whether they wished the Tribunal to hold a hearing. Five responses were received none objecting to a determination on papers only.

6. The relevant legal provisions are set out in the Appendix to this decision.

7. The Tribunal did not make an inspection of the Property.

8. The Tribunal received a bundle of documents prepared by the Applicant including responses from 5 of the 15 leaseholders each supporting the Application.

THE LEASES

9. The Applicant supplied a copy of the lease of flat 2 dated 26 August 2011 however this lease is for a flat without a balcony. During the Tribunal's consideration the chairman requested a copy of the lease of the flat affected by the balcony damage including a coloured plan. A copy of the lease of flat 9 was received without a coloured plan. It is understood that all leases have similar wording.

10. In accordance with the lease supplied the lessees are required to pay a contribution to the costs incurred by the landlord in carrying out its obligations under the lease as set out in the Fifth Schedule.

11. Under clause 5(5) of the lease the landlord is required to maintain and keep in good and substantial repair and condition the Building as defined.

THE PARTIES' REPRESENTATIONS

12. The Applicant explained that in October 2015 the balcony to flat 9 suffered partial collapse. After investigation it was found that the timber joists supporting the balcony had failed through wet rot and props were installed to stabilise the structure.

13. There then ensued protracted discussions between the Applicant and the NHBC who agreed that works were necessary under the warranties held by the lessees of the flats. It transpired that only 13 of the 15 flats had purchased NHBC warranties. Initially it was expected that NHBC would arrange for the remedial work; however in July 2016 NHBC decided to settle the claim by paying 13/15 of the cost of the work when incurred.

14. NHBC agreed to prepare a schedule of work but the landlord, or its managing agents, should arrange for contractors to tender. It was decided to instruct a firm of chartered surveyors to prepare a more detailed schedule of work, obtain tenders and administer the contract. Messrs Kingston Morehen chartered surveyors quoted for the work on 16 September 2016. It is unclear whether this firm is instructed.

15. The Applicant was directed to send each Respondent a standard form to be returned to the Tribunal and to the Applicant's agent indicating whether the application was supported or not. There were only 5 responses out of 15, each supporting the application and 4 indicating agreement to a hearing on papers only.

THE LAW

16. The 1995 Act provides the Respondents with safeguards in respect of the recovery of the Applicants' costs in connection with the works to the property through the service charge. Section 19 ensures that the Applicants can only recover those costs that are reasonably incurred on works that are carried out to a reasonable standard. Section 20 gives the Respondents an additional safeguard when the works carried out on the property are qualifying works which are defined as works on a building or any other premises, and the costs of those works would require the Respondents to contribute under the service charge more than £250 in any 12 month accounting period. When these circumstances exist, the additional safeguard is that the Applicants are required to consult in a prescribed manner with the Respondents about the works. If the Applicants fail to do this, the Respondents' contribution is limited to £250, unless the Tribunal dispenses with the requirement to consult.

17. This application is concerned with the further additional safeguard of section 20. The question for the Tribunal is whether the works are so urgent as to make the requirements to consult unnecessarily restrictive and time consuming. The questions of whether the costs of those works will have been reasonably incurred and whether those works are to reasonable standard are not a matter for this particular Tribunal.

18. The Respondents are entitled to put in another application challenging the reasonableness of the costs incurred and charged to the service charge and the standard of those works if they wish.

19. Section 20ZA of the 1985 Act is the authority which enables the Tribunal to dispense with the requirement for the Applicants to consult with the Respondents on the costs and nature of the proposed works. The dispensation may be given either prospectively or retrospectively. In this case the Applicants are asking for a prospective dispensation.

20. Section 20ZA does not elaborate on the circumstances in which it might be reasonable to dispense with the consultation requirements. On the face of the wording, it would appear that the Tribunal has a broad discretion. That discretion, however, has to be exercised in the context of the legal safeguards given to the Respondents under sections 19 and 20 of the Act. This was the conclusion of the Supreme Court in *Daejan Investments Ltd v Benson and Others (Deajan)* which decided that the Tribunal should focus on the issue of prejudice to the tenants in respect of their statutory safeguards.

21. Thus the correct approach to an application for dispensation is for the Tribunal to decide whether and if so to what extent the Respondents would suffer relevant prejudice if unconditional dispensation was granted. The factual burden is on the Respondents to identify any relevant prejudice which they claim they might have suffered.

THE FINDINGS

22. Under section 20 the Applicant is required to go through a two stage process of consultation[1]. The first stage involves the giving of a notice of intention to carry out the works. There is no evidence that the Applicant or its managing agent has had any communication with the lessees explaining their responsibilities under the lease or their likely financial liability under the service charge. The Applicant has been side-tracked and misdirected in its concern to involve the NHBC insurer. Regardless of whether the eventual cost to 13 of the 15 lessees will be covered by insurance, the total cost of the work, and consequently the charge made to each lessee, may well exceed the £250 limit and require S.20 consultation. The Tribunal is satisfied that, although some of the lessees may be aware of the repairs required, there has been no initial notice in any reasonable or clear form.

23. The immediate danger of collapse of the balcony was remedied by the provision of props to the underside. The Tribunal has no evidence that there is any further likelihood of collapse. This has removed any urgency as a ground to dispense with consultation. There has already been considerable unnecessary delay by involving insurers.

24. It follows that to delay repairs to allow the S.20 consultation process to be undertaken would not prejudice the lessees further. To the contrary the lack of any consultation at all would severely prejudice the lessees.

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[1] See Part 2 of Schedule 4 to the Service Charges (Consultation Requirements (England) Regulations 2003.

25. As part of the consultation process the Applicants will be required to have regard to any written observations from the Respondents in respect of the proposed works and the lessees have not had this opportunity causing further prejudice.

26. The second stage requires the Applicants to supply a statement of estimates and a response to any of the Respondents' comments arising from the Notice of Intention. The Tribunal formed the view that, as the cost is not yet known, the lessees (not just the two uninsured) have been severely prejudiced if the work proceeds without proper consultation as the likely individual liability is not yet known.

27. In this case the circumstances can be distinguished from *Deajan* in spite of there being no specific prejudice expressed by the Respondents. The form circulated to the lessees in response to the Tribunal's Directions makes no reference to prejudice or the reason why such prejudice might arise. The lessees are only asked to express, by completing and returning the form, their objection, or not, to the application itself. In addition there was an error in the form, no doubt during word processing, in that the works were identified as works to the lift. From the evidence submitted, the lessees in this case are unaware of their likely liability in cost or the prejudice that may arise from them being excluded from a consultation process. There has been no initial notice or anything resembling an explanation of the management company's intentions. All the Respondents have received is a copy of this Tribunal's Directions where (at 2.) the briefest of descriptions of the proposed works is given. The emphasis is on urgency and, to an unrepresented party, the impression given is that to refuse dispensation would cause the balconies to collapse. Having considered the evidence submitted the Tribunal considers that this is not a likely outcome. We have been told that temporary measures have been effective in preventing collapse.

28. The extent of the work is currently unknown, a surveyor has yet to be instructed to inspect and prepare a schedule of works. The cost is unknown, there have been no estimates. The lessees, not just the two uninsured, are unaware of their likely liability, their expectation is that those insured will be reimbursement by NHBC. It is not clear from the evidence that all the costs will be covered. In *Daejan* the works were finished and the estimates were available so the lessees had a pretty good idea of what was involved, it was just the formal consultation process itself that needed to be dispensed with, not here.

29. The Tribunal has no hesitation in finding that the Respondents will suffer severe prejudice if consultation is not undertaken in its full form and to further delay the commencement of the works, to allow full consultation, would not in itself cause additional prejudice in that temporary propping of the most seriously damaged balcony has proved effective. Clearly if the situation deteriorates and urgency becomes the overriding catalyst then the work could be undertaken and another application made for the Tribunal for consideration of dispensation if the consultation had not already been completed.

B H R Simms (chairman)

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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 time or not to allow the application for permission to appeal to proceed.

4. 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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
   (a) complied with in relation to the works or agreement, or
   (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]