10771

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/19UJ/LDC/2015/0001
Property	:	78, 79 and 80 Granby Close, Weymouth, Dorset, DT4 0SS
Applicant	:	Aster Communities
Representative	:	Capsticks Solicitors
Respondent	:	Miss P Jarman (First Respondent), Mr and Mrs A Grummett (Second Respondents), Mr and Mrs T Brown (Third Respondents)
Type of Application	:	Application for dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord & Tenant Act 1985. Application that all or any of the costs incurred by the Applicant in connection with the proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of service charge payments.
Tribunal Member	:	Judge N Jutton
Date of Decision	:	26 March 2015

DECISION

© CROWN COPYRIGHT 2015

1 **INTRODUCTION**

2 Granby Close, Weymouth, is a purpose-built crescent of ground and first floor flats built in the style of semi-detached properties. There are 4 flats per block. The Applicant is the freeholder of the block containing 77, 78, 79 and 80 Granby Close. The Respondents are respectively the lessees of 78, 79 and 80 Granby Close each holding under the terms of a long lease.

3 The Applicant applies to the Tribunal pursuant to section 20ZA of the Landlord & Tenant Act 1985 for dispensation in respect of certain of the consultation requirements provided for by section 20 of the Landlord & Tenant Act 1985 in respect of works it is proposed to carry out to the roof of the Property (the Works).

4 The First Respondent makes an application pursuant to section 20C of the Landlord & Tenant Act 1985 that the Applicant's costs incurred in relation to these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by her.

5 The Applicant and the First Respondent stated on their respective applications to the Tribunal that they were content for the matter to be dealt with as a paper determination without a hearing. By directions dated 6 January 2015, the Tribunal directed that the matter be dealt with without a hearing in accordance with rule 31 of the Tribunal Procedural Rules 2013 unless a party objected in writing to the Tribunal within 28 days of receipt of those directions. No such objection was received and the Tribunal therefore proceeds to determine the matter without a hearing on the papers submitted to it.

6 **Documents**

7 The documents before the Tribunal were a bundle of some 250 pages comprising the Applicant's application, the First Respondent's application, copy leases for Nos. 78, 79 and 80 Granby Close, Directions made by the Tribunal, the Applicant's Statement of Case and supporting documents, and Statements of Case made by the First and Second Respondents together with supporting documents. References to page numbers in this Decision are references to page numbers in the said bundle.

8 **The Law**

9 The statutory provisions relevant to the Applicant's application are to be found in sections 20 and 20ZA of the Landlord & Tenant Act 1985 (1985 Act) and in the Service Charge (Consultation Requirements)(England) Regulations 2003 (The Regulations).

Section 20 of the 1985 Act provides as follows:

"20 Limitation of service charges: consultation requirements

(1) *Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with either sub-section (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 .....*

(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 sub-section (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 sub-section, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contributions would otherwise exceed the amount prescribed by, or determined in accordance with the regulations, is limited to the amount so prescribed or determined.*

Section 20ZA of the 1985 Act provides:

"(1) Where an application is made to the appropriate 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".

10 It is not proposed to set out the relevant provisions of The Regulations in detail here. In summary, the requirements may be divided into 3 stages.

11 Stage 1 provides for the Landlord to serve a notice of intention to carry out qualifying works on each Leaseholder. The notice must describe in general terms the proposed works or specify the place and hours where the description of the works may be inspected. The notice must state the reason for the works and invite written observations specifying where they should be sent, over what period (30 days from the notice) and the end date. The notice must contain an invitation for nominations of persons from whom the Landlord should obtain estimates. The Landlord must have regard to written observations that he receives during the consultation period.

12 Stage 2 provides for the Landlord to seek estimates. Thereafter the Landlord must issue a statement setting out the estimated cost from at least 2 of the estimates, and a summary of the observations received during the stage 1 consultation period and his response to them. If any estimates have been received from the Leaseholder's nominees, they must be included in the statement.

13 Within the said statement, the Landlord should issue a notice detailing where and when all the estimates may be inspected and inviting each Leaseholder to make written observations on any of the estimates, specifying an address, where they should be sent, the consultation period (30 days from the notice) and the end date. The Landlord must then have regard to written observations received within the second 30 day consultation period.

14 Stage 3 provides that unless the chosen contractor is the Leaseholder's nominee or the lowest estimate, then the landlord must give notice within 21 days of entering into the contract to each Leaseholder stating his reasons for the selection or specifying a place and hours for inspection of such a statement.

15 **The Leases**

16 In the bundle are copies of the leases for 78, 79 and 80 Granby Close. They are in like form. They provide as follows:

17 By clause 3(a) the Lessee covenants with the Lessor to *"Pay to the Lessor such annual sum as may be notified to the Lessee by the Lessor from time to time as representing the due proportion of the reasonably estimated amount required to cover the cost and expenses incurred or to be incurred by the Lessor in carrying out the obligations or functions contained in or referred to in this clause and clauses 4 and 6 hereof and in the covenants set out in the Eighth Schedule hereto (such cost and expenses being hereinafter together called 'the Management Charges') ... AND it is hereby declared that the Management Charges may (without prejudice to the generality of the foregoing) and so far as it is lawful so to do include such amounts as the Lessor shall from time to time consider necessary to put in reserve to meet the future liability of carrying out major works to the Property, the Reserved Property or to the demised premises ...".*

18 Clause 3(b) of the Lease provides for the Lessee to pay to the Lessor the amount by which actual 'management charges' incurred exceed estimated sums paid and further (clause 3(c)) if the estimated charges exceed the actual charges, such excess is credited to the account of the Lessee.

19 By clause 4 the Lessor covenants to perform and observe and carry out or cause to be carried out the covenants and obligations set out in the Eighth schedule to the Lease.

20 Clause 6 provides that the Lessor will at all times manage the Property in a proper and reasonable manner and entitles the Lessor to, amongst other things, appoint a managing agent, to employ architects, surveyors, solicitors and other persons or companies, and to generally delegate its functions upon such terms and conditions and for such remuneration as the Lessor shall think fit.

21 The Eighth schedule to the Lease sets out the covenants to be observed by the Lessor. Clause 1 provides for the Lessor *"to keep in good and substantial*

repair and condition (and whenever necessary re-build and reinstate and renew and replace all worn or damaged parts)

(i) the main structure of the Property including ... all roofs and chimneys and every part of the Property above the level of the top floor ceilings".

22 **The Applicant's Case**

23 The Applicant's case is set out in a Statement of Case dated 3 February 2015 with appendices (pages 145-230) and in its application form to the Tribunal (pages 1-8 inclusive).

24 On 4 April 214, the Applicant instructed a firm of Chartered Surveyors, Turner Associates of Weymouth, Dorset, to inspect the condition and life expectancy of the roofs of the properties at Granby Close including the roof at the Property. Mr Colin Turner Chartered Surveyor inspected the roofs at Granby Close on 29 April 2014 and a report made by him in writing dated 7 May 2014 together with photographs is at pages 149-170. Mr Turner inspected Nos. 32, 62 and 78 Granby Close.

25 Mr Turner reported that in his opinion the 'building paper' had reached the end of its life. He noted minor evidence of penetrating damp around the chimneys and said there was no evidence of current penetrating damp to the roof covering. Using a Protemeter Survey Master Damp Meter, he said that no evidence of higher than normal moisture levels was noted at the time of the inspection apart from to the chimney breast at high level. Mr Turner concluded that the properties would require re-roofing in the very near future and that in his view the maximum period of time that this could be deferred was 5 years but subject to the rider that work might need to be brought forward should dilapidation of the roof tiles increase and water penetration take place.

26 On 26 September 2014 Mr M J Burr a Planned Maintenance Surveyor employed by the Applicant carried out a further inspection of the Property, in particular to the 3rd Respondent's property No. 80 because of complaints of water ingress. His report dated 29 September 2014 is at pages 172-178. Mr Burr noted evidence of water penetration at the eaves level to the front elevation and said that an inspection of the roof tiles showed that daylight could be seen in multiple locations which would allow driving rain to pass through the tiles and into the roof void. He concluded that the building paper had reached the end of its life on two elevations, the front and side elevations, which he described as offering *"little or no protection"*. He concluded that although Mr Turner had suggested a programme to allow for a sinking fund, that as there had been water ingress into No. 80 since December 2013 which had not been rectified, that *"it would be logical to re-roof this block of flats"*.

27 Following receipt of Mr Burr's report, the Applicant sought estimates from two roofing contractors, SBL UK Ltd and O'Brien Roofing & Leadwork Ltd. Those estimates are at pages 180-184 inclusive. The O'Brien quotation is dated 27 October 2014. It provides for two options, both in relation to the works to the roof and the works to the chimney. The first roof option is

replacement of the roof using new concrete plain tiles. The second option is replacement of the roof but re-fitting the existing concrete plain tiles. The first option for the chimney repair is raking out and re-pointing the brickwork, installing bird guards, and blocking off two of the chimney pots to *'re-haunch top of chimney'*. The second chimney option is re-building the chimney by removing the existing chimney to roof line, re-building and installing lead trays, bird guards etc. The quotation also makes provision for scaffolding, the provision of insulation to the roof space, work to fascias and soffits, and replacement of rainwater goods.

28 The SBL UK Ltd quote is dated 30 October 2014. It also contains two options. The first option allowing for the replacement of the roof using new concrete tiles and the second option replacing the roof using the existing concrete tiles. There is also provision for the application of insulation, repointing of the chimney and work to the fascias, guttering and soffits.

29 On 21 November 2014, the Applicant commenced a consultation process pursuant to section 20 of the 1985 Act by serving notice on each of the Respondents. Those notices appear at pages 186-197 inclusive. That it is said constituted the stage 1 notice of the process set out above.

30 However, the Applicant says that it was concerned in light of Mr Burr's report and the complaints of water ingress from the Third Respondents that remedial works were urgently required because ongoing water ingress into the roof might affect the fabric of the building generally and lead to an increase in remedial costs. The Applicant submits that it is reasonable in the circumstances that the formal consultation requirements pursuant to section 20 of the 1985 Act should be dispensed with. The Applicant also says that it would not be appropriate if the Tribunal were minded to grant dispensation, to do so on terms for example by reducing the amount of the service charge costs that would be payable for the Works or by making provision for payment of reasonable legal or professional fees that might be incurred by the Respondents relating to these proceedings. The Applicant says that it makes its application to the Tribunal in a timely manner and before the Works have been undertaken.

31 The Applicant also says that notwithstanding its application to the Tribunal that it is continuing with the section 20 consultation process as a *"twin track 'strategy' in order that the remedial works at the Property can be undertaken at the earliest opportunity"*.

32 **The Respondents' Case**

33 Submissions were received by the Tribunal from the First and Second Respondents.

34 **First Respondent's Case**

35 The First Respondent's Statement of Case is at pages 237-253.

36 The First Respondent says that the Tribunal should not grant the Applicant dispensation because that would deprive the Respondents of the opportunity *"...within the legal process to nominate a contractor to ensure a competitive price and quality of workmanship"*. The First Respondent says that the Respondents are being prejudiced by a failure on the part of the Applicant to comply with the consultation process, a process which would encourage competition and ensure that the Works proposed would be carried out for a fair and reasonable price. That if dispensation were granted, the Respondents would be denied the opportunity for their own nominated contractors to quote for the cost of the works and for that to be considered by the Applicant.

37 The First Respondent has obtained two quotations for the cost of the Works from other contractors. They are from Davey Roofing South West and Weatherbury Roofing. (At Appendix 4 to the Applicant's Statement of Case are copies of responses received from lessees to stage 1 of the consultation process. There are around 20 responses of which no fewer than 15 ask for estimates to be obtained from either Davey Roofing South West or Weatherbury Roofing or both). The First Respondent has helpfully set out at page 240 comparisons of the two quotations obtained by the Applicant from SBL UK Ltd and O'Brien Roofing & Leadwork Ltd with those that she has obtained from Davey Roofing and Weatherbury Roofing. The Davey Roofing figure she says were provided by telephone. The Weatherbury Roofing quotation is at pages 251-252. The First Respondent appears to have obtained quotations on a like for like basis. The quotations are for a replacement roof using new tiles including scaffolding, insulation, work to soffits and fascias and repair of rainwater goods. In each case the quotation provides for a repair to the chimneys rather than re-building the chimneys. The lowest quotation is that of Weatherbury Roofing which, inclusive of VAT and admin charges at 10%, is £24,635. The most expensive, that of O'Brien Roofing & Leadwork Ltd which including VAT and 10% administration charges, is £39,399.26.

38 The First Respondent says that the Applicant's favoured contractor is SBL UK Ltd whose figure including VAT and 10% administration charges is £27,249. She expresses concern that the insulation proposed by SBL UK Ltd would be of the wrong size. She says that SBL UK Ltd is quoting for 200mm replacement insulation which she contends does not comply with regulations which she says provide for 270mm insulation.

39 The First Respondent describes Weatherbury Roofing as a local reputable contractor and a member of the Confederation of Roofing Contractors. The First Respondent asks, *"Why are competitive, local well-established roofers being excluded from the official process and being given reasons for not quoting which are untrue?"*

40 **Second Respondent's Case**

41 The Second Respondent expresses concern that the Applicant has failed to obtain competitive quotes from *"well established roofing contractors"*. He questions the need for a completely new roof. He does not accept that the roof tiles have come to the end of their useful life and contends that it is unreasonable for the Applicant to suggest that all the roofs at Granby Close

should be replaced. He accepts there is some water ingress localised to the chimney which he says points to problems with the flashing, soaker, trays and apron around the chimney.

42 He attaches to his Statement of Case three quotes for the cost of re-roofing the Property. (He refers to them as quotes although two are described as estimates.) They are:

i. DW Roofing Limited dated 13 January 2014 for £14,880 including VAT. This estimate uses the existing sound tiles. It includes re-dressing leadwork to the chimney. There is no reference to work to soffits, fascias and guttering.

ii. Anthony Randall Roof Repairs dated 17 December 2013 for £17,492. It is not clear as to whether this includes or is exclusive of VAT. It includes the replacement of fascias, soffit boards and guttering and new soakers under the lead flashing around the chimney stack. It provides for new tiles.

iii. J Marks & Sons Roofing dated 11 December 2013 for £23,580. It includes the replacement of soffits, fascias and guttering. It provides for the use of new tiles.

43 The Second Respondent also expresses concern that one of the quotes obtained by the Applicant provides for the installation of insulation which he says fails to meet current building standards and regulations. The Second Respondent says it is clear that repairs need to be made forthwith. However, he contends that if repairs are carried out, the need to replace the roof can be delayed for a few years to allow time for a sinking fund to be put in place to raise the necessary monies to meet the costs of such work.

44 **The Tribunal's Decision**

45 The Tribunal is bound by the decision of the Supreme Court in the case of **Daejan Investments Limited v Benson** (2013) UKSC 14.

46 The Supreme Court said in Daejan that the purpose of the consultation requirements were to ensure that tenants were protected from paying for inappropriate works or paying more than would be appropriate.

47 The question for the Tribunal is the extent to which, if any, the Respondents would suffer relevant prejudice if dispensation were granted and the consultation process not completed.

48 Daejan made it clear, that notwithstanding the burden that this may place upon leaseholders, the factual burden of identifying some relevant prejudice rested with the leaseholders. The factual burden therefore of identifying some relevant prejudice that would be or might be suffered by the Respondents if the consultation process is not completed rests with them.

49 The Applicant says that notwithstanding the application, it is continuing with the section 20 consultation process as a 'twin track strategy'. The consultation

process was started on 21 November 2014. If it has been continued, it may by the date of this Decision have been more or less completed. However, no papers have been produced by either party to show that the consultation process continued beyond stage 1.

50 In the view of the Tribunal, the Respondents have identified three possible areas of relevant prejudice. They are:

i. Financial prejudice. It contended that the Applicant in failing to complete the consultation process denies the Respondents the opportunity to have their own nominated contractors provide quotes for the Works and for those quotes to be properly considered. The First Respondent in particular has gone to some effort to produce alternative quotations (albeit one by telephone) which as far as reasonably possible, appear to the Tribunal to be on a like for like basis with the two quotes produced by the Applicant. The alternative quotes produced by the First Respondent appear to be up to date. (There is no date given for the Davey Roofing quote but it is a reasonable assumption that it was produced relatively recently). The Weatherbury Roofing quote is dated 3 March 2015.

   The Second Respondent has also produced quotes. He has produced three quotes, although properly two are described as estimates. The most recent of those is dated January 2014. They are not up to date quotes/estimates. Nor in the main are they on a like for like basis with those produced by the Applicant. Further allowance would need to be made for comparison purposes (as the First Respondent has), for administration costs.

ii. Insulation. Both the First and Second Respondents have expressed concern that one of the quotations obtained by the Applicant (which the First Respondent identifies as that from SBL UK Ltd) provides for 200mm replacement insulation which they say does not comply with the current regulations. Neither identifies the regulations referred to.

iii. Unnecessary work. The Second Respondent says that works to replace the roof are not necessary. That it would be sufficient to carry out certain repairs to stop the immediate ingress of water and then replace the roof in a few years' time so that in the interim a sinking fund can be built up. Although the Second Respondent works in the construction industry, he does not produce any evidence to support his contention. The Tribunal on balance prefers the evidence produced by the Applicant in the form of the reports from Mr Colin Turner of Turner Associates and Mr M J Burr the Applicant's own Planned Maintenance Surveyor (albeit Mr Burr appears to be an employee of the Applicant's).

51 The Tribunal views the Respondents' arguments sympathetically. The consultation requirements are there for the protection of lessees. Although the Applicant contends the Works are required urgently, it does not appear to be rushing to have the Works carried out. It seems inconsistent for the Applicant on the one hand to suggest that the works to replace the roof are required urgently but on the other, to contend that it will continue with the

section 20 consultation process as a 'twin track strategy' at the same time (albeit there is no evidence that it has done so).

52 The Tribunal accepts the Respondents' case that if the consultation process is not completed/dispensation is granted that it will suffer some relevant prejudice. In particular, financial prejudice. It is not just the First Respondent who asked the Applicant to obtain quotations from Davey Roofing and/or Weatherbury Roofing but also a large percentage of fellow lessees who responded to stage 1 of the consultation process (see the responses at pages 198-230). On the figures produced by the First Respondent, the Weatherbury Roofing quotation including 10% allowed for administration fees totals £24,635, some £2600 less than the lowest quotation obtained by the Applicant.

53 As the Supreme Court identified in Daejan, there is a balance to be had between ensuring that lessees do not receive a windfall because the power to grant dispensation is exercised too sparingly, and ensuring that landlords are not cavalier in adhering to the consultation requirements because the power to grant dispensation is exercised too loosely. In particular, are the Respondents in this case prejudiced if dispensation is granted because that may result in them having to pay for inappropriate works or for paying more than would be appropriate? In the view of the Tribunal, there is a very real risk that the Respondents would suffer such relevant prejudice. However that prejudice can be reasonably addressed by granting dispensation on terms.

54 In all the circumstances, in the view of the Tribunal, it is appropriate to grant dispensation to the Applicant but on terms. The Tribunal grants the Applicant's application for dispensation on the following terms:

i. That the amount that the Applicant can recover from the Respondents by way of service charges for the Works be limited to the amount of the quotation obtained by the First Respondent from Weatherbury Roofing dated 3 March 2015, that is a total sum including VAT and administration costs of 10% of £24,635.

ii. That the Applicant shall take such steps as it reasonably can (to include giving clear instructions to such contractor as it retains to carry out the Works) to ensure that the Works including the installation of insulation shall be compliant with current Building Regulations and any other applicable regulations.

55 **The First Respondent's Application pursuant to section 20C of the 1985 Act**

56 The First Respondent seeks an Order that all or any of the costs incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the First Respondent.

57 The First Respondent says that the Applicant has applied for dispensation by instructing a Solicitor rather than discussing the matters further. It would be

unfair, the First Respondent says, if the landlord's costs in making this application be passed on to her through the service charge.

58 No representations have been made by either party as to whether or not the terms of the Lease allow the Applicant to recover as part of the service charge the costs that it incurs in relation to these proceedings.

59 In granting dispensation on terms, the Tribunal seeks as far as it reasonably can to put the Respondents in the position that they would have been had the consultation process been completed. In those circumstances there would have been no application for dispensation and the Applicant would not have incurred any costs in relation to these proceedings; there would have been no proceedings. The Applicant is seeking what was described in Daejan as an indulgence from the Tribunal at the expense of the Respondents. Accordingly (leaving aside the question as to whether or not the Lease allows for recovery of such sums) the Tribunal is of the view that it would be reasonable to add a further term to the granting of dispensation. That is, that all costs or fees incurred by the Applicant in relation to this application will be borne by the Applicant and may not be recovered from the Respondents as part of service charges or pursuant to any other provision upon which the Applicant might seek to rely contained in the Lease.

60 In the circumstances, there is no need for the Tribunal to make an Order pursuant to section 20C of the 1985 Act.

61 **Summary of Tribunal's Decision**

62 The Tribunal grants the Applicant's application for dispensation on the following terms:

i. That the amount that the Applicant can recover from the Respondents by way of service charges for the proposed works to replace the roof at the Property be limited to the sum of £24,635 (£6,158.75 per Lessee).

ii. That the Applicant shall take such steps as it reasonably can to ensure that the works to replace the roof of the Property including the provision of insulation are compliant with all current Building Regulations and any other applicable Regulations.

iii. That all costs and fees incurred by the Applicant in relation to these proceedings may not be recovered from the Respondents by way of service charges or otherwise.

Dated the 26th day of March 2015

Judge N Jutton

Appeals

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.