FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/19UH/LDC/2020/0037
Property	:	Chesil House Station Road West Bay DT6 4EW
Applicants	:	Chesil House Management Company Limited
Representative	:	Initiative Property Management
Respondent	:	Gillian Chater and Paul Tiernan
Representative	:	
Type of Application	:	To dispense with the requirement to consult Lessees about major works Section 20 ZA Landlord and Tenant Act 1985 (The Act)
Tribunal Member(s)	:	Mr W H Gater FRICS MCIArb Regional Surveyor
Date and Venue of Hearing	:	2 September 2020 Online
Date of Decision	:	22 September 2020

DECISION

The Application

1. In an application dated 2 June 2020 the Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the Landlord by Section 20 of the 1985 Act.

2. The Applicant explains that it wishes to seek dispensation from consultation in respect of the works to deal with dampness in flats 11&12. The work is considered urgent because they will solve poor living conditions in those flats which is leading to and could cause physical and mental health conditions.

3. The Application for dispensation was received on 4 June 2020.

4. On 10 June 2020 the Tribunal issued directions for determination on the papers alone.

5. The Tribunal received responses from the owners of 8 flats, numbers 1,3,5,11,22,24,25 and 28, all of whom agreed with the Application. Those who agreed or failed to respond to directions were removed as Respondents in this case. The application was opposed by the owners of Flat 9, Paul Tiernan and Flat 29 Gill Chater. Representations were included in the bundle from Gill Chater and Mervyn Mitchell as owners of Flat 29.

6. On 8 July 2020, the Applicant served the Tribunal with a hearing bundle of documents.

7. On receiving the bundle the Tribunal found that clarification and further information was required in order to determine the matter and it directed that a remote hearing take place on 2 September 2020.This was conducted using the CVP online hearing platform.

8. The Applicant was represented by Mr Greaney and supported by Mr John Sterling of Initiative PM and Ms Lindsey Blair a director of Chesil House Management Company Limited and flat owner.

9. The Respondent Miss Chater also represented Mr Tiernan who was unable to attend.

Preliminary issue

10. Since the original bundle was issued both the Applicant and Respondent have submitted large amounts of additional documentation and copied emails to the Tribunal. The latest arrived on 28 August and 1 September. Both parties sought to introduce these documents as further evidence in support of their case.

11. In an application dated 1 September 2020, the day before the hearing Gillian Chater applied to the Tribunal to receive and review the late

documentation and photos issued by the Respondents by email on 28 August 2020.

12. Miss Chater stated that they had received the notice of tribunal late and therefore the documents were delivered close to the hearing.

13. She said that she had to respond to the Applicant's additional information as she felt strongly that the works were not urgent.

14. The Tribunal dealt with this as a preliminary issue. It held that the late production of evidence, in large amounts was contrary to the directions of June 2020.

15. These set out the format and delivery dates for submission and exchange of evidence. The late submissions of unnumbered documents gave no time for each party to absorb the information. The Tribunal found that the existing bundle, with the opportunity to question at the hearing was sufficient and proportionate for the administration of justice in this case.

16. Accordingly, it refused consent to admit the documents. It was prepared to listen to the case for reference to a small number of key documents during the hearing where appropriate.

17. The Tribunal pointed out at the outset that this was an application for dispensation under section 20ZA of the Act and that it was not to be confused with an application to determine the reasonableness and payability of service charges under section 27A of the Act.

Evidence

18. The Applicant's case. For the Applicant Mr Sterling said that the issues with Flats 11 & 12 led to poor physical and mental health conditions for the occupiers. One resident has a lung related illness and as a result the repairs were urgent.

19. He said that the late evidence included emails from the occupiers of flats 11&12 commenting on living conditions there.

20. Ms Blair for the Applicant spoke of the occupier's mental health being affected, displaying a fear of bad weather. Water was bubbling up from the floors and walls.

21. The Applicant had obtained a report from Christmas and Brugge Chartered Surveyors dated 13 November 2019, detailing defects of condition in flats 11 and 12 relating to dampness and leakages.

22. It had been difficult to obtain contractor's quotes due to the pandemic crisis but the works have now been completed by a trusted contractor.

23. The Applicant also referred to an email in his late evidence from Mr Hurt, a director of the FHMC supporting the application. The Applicant believed that Mr Hurt is a retired surveyor.

24. In three years managing the property he had had more difficulty dealing with Miss Chater and Mr Mitchell than any of the other residents.

25. Questioning the Applicant, Miss Chater asked what action was taken following the Christmas and Brugge report of 13 November 2019? The Applicant replied that attempts were made to secure contractors in December and a quote was obtained from Wright and Sons builders. With the Christmas period and subsequent Covid lockdown the matter became delayed until March.

26. When asked why he did not inform the residents he said that there were a lot of things going on at the site and time was needed to consider a course of action before going to the residents.

27. Ms Blair added that the weather changed after Christmas. Whilst the matter then became more urgent it was still difficult to obtain quotes.

28. The Respondent's case The Respondent said the she and her partner have a background in finance and showed an interest in the financial arrangements at the property. She referred to previous cases that had found against the management of the property.

29. She believed that previous managers were disreputable and she had not found problems with the management of other properties they own.

30. Christmas and Brugge had issued a report on the whole of the property and two specific flats in 2014.They found that dampness was caused by infilling of balconies where the walls were previously external. The report said the problem was the responsibility of the individual flat owners.

31. She referred to a report from Wright and Son contained in her late evidence, which drew that same conclusion.

32. She believed that leaseholders had made the changes without permission.

33. The problems have been known about for six years and the owner of flat 11 is in fact Ms Blairs husband.

34. There was a history of poor communication by the managers. Leaseholders were not kept informed and minutes of meetings were not issued. She felt leaseholders were being kept in the dark.

35. On 25 June 2020, the day after receiving the notice of the application, Mr Stirling spoke to her, strongly urging her to stay away from objecting to the application. This was repeated in an email and she took this as a veiled threat. Our flat may suffer.

36. She had asked in May and June what was happening and was told that the matter was being looked into. In fact the application was being made and was dated 2 June 2020.

37. Miss Chater said that she was not told of the application until 1657 on 23 June 2020, at the end of the period for a response. When she asked the Applicant for an extension of time she was refused.

38. She and her partner own other flats and have none of these problems.

39. She believed that as a director of the FHMC and owner of a flat Ms Blair, as with other directors, will have long been aware of the problems and that the matter was not urgent. This was not sudden although it was unpleasant. But nothing was done between December and March .

40. There was no reason to fail to carry out Section 20 consultation. The leaseholders had not had an opportunity to comment on the works.

41. At least one contractor was from Bournemouth, a two hour round trip, which will have added to the cost. There were plenty of local contractors who could have quoted.

42. The actual works went far beyond what was included in the application and may have included an element of internal refurbishment.

43. The works undertaken are far in excess of what was necessary to cure the damp.

44. In questions to the Respondent Mr Greaney asked what evidence there was that Mr Tiernan had objected. The Tribunal Clerk was able to confirm from records that Mr Tiernan's objection had been received but it was not clear whether he had copied this to the Applicant as directed. Mr Tiernan had also commented on the lateness of his notification of the application by the Applicant.

45. Mr Greaney asked if the respondent was aware that the contractor who undertook the works was from Bridport and that works carried out included flat 29 owned by the Respondent.

46. Miss Chater pointed out that that was incorrect. No works had been done to her flat which has no cladding.

47. He then asked if Miss Chater owned a share in the Management company and was she aware that the managers hold four directors meetings per annum.

48. Miss Chater replied that ordinary shareholders were not kept updated. The minutes of 2019 had only just been issue. If unable to attend the AGM it is hard to know what is going on.

49. Miss Chater was asked if she was aware that Landlord and Tenant law rules on the issue of accounts and that the Institute of Residential Property Management guidance stipulates a six month period for issue of accounts. She replied that the lease, which overrides such matters, states that accounts must be issued by 31 July 2020.

50. Ms Blair asked Miss Chater whether she knew that the dampness now being cured was not connected to the dampness caused by balcony infills and that flats 11 &12 has dampness away from clad external walls? Miss Chater was not aware of this but commented that condensation is a problem in many flats here.

51. Ms Blair asked if Miss Chater was aware that consent to infill balconies was granted some years ago. She answered no.

52. When asked by Ms Blair what the relevance of her being married to the owner of flat 11 was .She said that the Tribunal would be unaware and there may be an issue of conflict of interest.

53. The Tribunal asked Miss Chater how she might be prejudiced by the granting of dispensation. She said that she takes a keen interest in expenses and had contributed to discussion in the past. Leaseholders had not been permitted to scrutinise the contractor's, the costs or the tender process.

54. Having further works done whilst the scaffolding was up made sense but owners have had no say. The façade of the building had been changed, its appearance had altered without an opportunity to comment.

55. Miss Chater said that she had not been aware that the current damp problems were not associated with the infilled balconies and asked that all flats are checked for such problems.

56. In answer to questions from the Tribunal Mr Stirling confirmed that he was a member of the IRPM and was aware of and compliant with the RICS Residential Management code.

57. Mr Greaney confirmed that the report from Christmas and Brugge was not a specification but that it had been used to invite contractors to offer solutions when quoting for the works.

58. The application refers to flats 11 &12 but in order to remedy this it was necessary to expand the work to five flats.

59. Mr Greaney confirmed to the Tribunal that the quotation process involved inviting a number of contractors. Quotes had been received from Wright and Sons in December 2019 and from Darren Poole in March 2020.

60. Questioned by the Tribunal about compliance with directions Mr Stirling said that due to human error the application details had initially only been sent to the directors of the FHMC. Remote working in lockdown whilst being busy had been the cause. The other notifications had gone out late as described by the respondents and the Tribunal by default had not been properly notified as directed.

61. The Tribunal asked the parties if they had had sufficient chance to make their case and ask questions. They answered in the affirmative although Mr Greaney did ask two supplementary questions of the Tribunal.

62. The first was ,will there be allowance for the Covid crisis when considering compliance with direction? The tribunal said that this was a matter for deliberation

63. Mr Greaney then asked if the bundle of 28 August 2020 would be accepted as evidence. The Tribunal had already confirmed that this would not be admitted as evidence but that opportunity had been given during the hearing to refer to parts.

The Law

64. The relevant section of the Act reads as follows:

20ZA Consultation requirements:

a. Where an application is made to a Leasehold Valuation 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.

65. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson. In summary the Supreme Court noted the following

66. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

67. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

68. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

69. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.

70. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).

71. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.

72. The court considered that “relevant” prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.

73. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

74. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Discussion and Determination

75. The Tribunal finds that the application for dispensation is poorly supported by the Applicant.

76. The Applicant’s evidence that the health of the occupants was a concern, issues of the change of weather at the turn of the year and difficulties in securing builders quotes during lockdown does not persuade the Tribunal that it was impossible to consult with the residents more fully during the time involved.

77. The surveyors report is a general one without recommendations or specification, yet is described as such in evidence.

78. The quotation dated 18 March 2019 from Darren Poole builders for cladding the front of the flats was on a cost per flat basis. It was vague as to the flats covered, the exact work specified and offers no guarantees. A subsequent copy of the same letter with hand written figures shows a total cost of £16235.70. It does not specify whether this includes VAT for which the builder is registered.

79. It was not clear during paper deliberations whether all of the Respondents were given notice of the application and an opportunity to comment in the manner and timing directed on 10 June 2020.

80. Subsequently at the hearing the Applicant told the Tribunal that notices had not gone out as described and in breach of the Tribunal directions.

81. Whilst the Respondents clearly feel strongly about issues at the property , the Tribunals jurisdiction on this application relates to dispensation only. Matters such as standard of and liability for works, poor communication, distrust of managers and date of issue of accounts are not within the scope of this determination.

82. The Tribunal is therefore mindful that it’s jurisdiction in this type of application is limited to whether it should grant dispensation from

consultation requirements. In this respect the test laid down in the Daejan case would need to be met before dispensation is refused.

83. The Tribunal has not heard sufficient evidence to suggest that the residents would be prejudiced to the extent envisaged in the Daejan case above, if dispensation was granted.

84. **Accordingly the Tribunal grants conditional dispensation from all or any of the consultation requirements of Section 20 Landlord and Tenant Act 1985.**

85. The condition of the dispensation is that the Applicants pay the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).The Tribunal further orders that the Applicant costs and all associated costs of the application shall not be charged to the residents or service charge account.

86. The Tribunal's decision is confined to the dispensation from the consultation requirements in respect of the qualifying works. The Tribunal has made no determination on whether the costs of those works are reasonable or payable. If a leaseholder wishes to challenge the reasonableness of those costs, then a separate application under section 27A of the Landlord and Tenant Act 1985 would have to be made.

87. The Tribunal will send a copy of the decision to the Leaseholders who responded. The Tribunal asks the Applicant to inform the other Leaseholders of this decision by way of noticeboard or other forms of communication.

W H Gater FRICS ACIArb
Regional Surveyor
22 September 2020

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.