11653

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBE/LDC/2016/0025**
Property	:	**Flat 2, Havisham House, Dickens Estate, Scott Lidgett Crescent, London SE16 4UY**
Applicant	:	**London Borough of Southwark**
Representative	:	**Miss C Dowding, Enforcement Officer** **Mr P Cremin, Solicitor**
Respondent	:	**Mrs C M A Fagbodun**
Representative	:	**Miss N Dincgun, Southwark Citizens Advice Bureau** **Accompanied by Mr & Mrs Fagbodun**
Type of Application	:	**Application for dispensation for all or any of the consultation requirements provided by Section 20 of the Landlord and Tenant Act 1985**
Tribunal Members	:	**Tribunal Judge Dutton** **Mr P S Roberts Dip Arch RIBA**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 11th May 2016**
Date of Decision	:	**23rd May 2016**

DECISION

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DECISION

The Tribunal determines that it will grant dispensation from the consultation requirements under the provisions of Section 20ZA of the Landlord and Tenant Act 1985 (the Act) for the reasons set out below.

BACKGROUND

1. This is an application made by the London Borough of Southwark (the Council) for dispensation under Section 20ZA of the Act from the consultation requirements relating to major works carried out by Standage and Co Limited for warm, dry and safe works at the Dickens Estate in London SE16. One block on the Dickens Estate is Havisham House and within that block Miss Fagbodun owns Flat 2. It is the Council's case that it did serve the initial notice under the provisions of Section 20 of the Act dated 20th December 2013 setting out the works to be carried out to the various blocks and in particular to that at Havisham House. The Council accepts, however, that the the stage 2 notices dated 21st August 2014 and the 19th February 2015 were served on the Respondent at her Flat address notwithstanding that on 4th August 2014 the Respondent emailed the Home Ownership department telling them that the address for correspondence was 4 Baillie Close, Rainham, Essex.

2. Before the hearing we were provided with a bundle of papers which included the application, submissions made both by the Applicant and the Respondent with the replies thereto, a number of exhibits particularly annexed to the Applicant's reply and a copy of two cases the first being Daejan Investments Limited v Benson and others and the second being A2 Airways Housing Group v Taylor.

3. In the submissions dated 22nd February 2016 the Council accepted that they had received the email giving the new Rainham address but that for reasons that were not clear this had not made its way to the computer and that subsequently correspondence continued to be sent to the flat address. On 19th February 2015 an invoice was issued and again was sent to the flat address although it did come to the attention of the Respondent because she wrote by letter dated 25th March sent from the flat address confirming receipt of the invoice and indicating that she did not have the money to settle the amount claimed and would be taking legal advice. The amount shown on the invoice is some £23,203.56 and a breakdown of that amount is contained at paragraph 10 in the Council statement of case of 22nd February 2016.

4. That statement of case goes on to suggest why dispensation should be granted and sets out in the Council's view that no prejudice has been caused to the Respondent for the reasons stated therein.

5. This matter had originally started life in the County Court but the proceedings had been stayed purely for the purposes of this application for dispensation. We were provided with a copy of the defence that had been filed on behalf of Mrs Fagbodun which essentially denies liability on the basis that the provisions of Section 20 had not been complied with. The defence does not raise any arguments as to prejudice.

6. However, by a statement which is dated 1st April 2016, the Respondent, in response to the Applicant's submissions, whilst repeating the defence, under the

heading "Relevant Prejudice" said that the lack of the notice of intention which she says was not sent to her as well as the second and third stages which the Council admits it did not provide, resulted in the Respondent being unable to make observations and fully participate in the consultation process. The statement went on to suggest that it would be wrong to grant unconditional retrospective dispensation as it would be a "significant breach of her statutory rights." The statement went on to say that if a notice of intention had been served the Respondent would have instructed a chartered surveyor to obtain a professional opinion as to whether the works were required. It was suggested that those works set out in the notice of intention, which the Respondent has now seen, appeared to be unnecessary.

7. The statement went on to refer to the case of Daejan and the Tribunal's power to impose a condition on the landlord to pay the leaseholder's reasonable costs incurred with the application. We were asked to exercise our power to impose such a condition so that the Respondent could instruct professionals to ascertain the exact amount of costs in dispute. The statement further went on to say that if a notice of proposal had been served, then the Council should have provided a schedule of works and costs so that the Respondent could deal with those and that she was denied the opportunity to participate in the consultation process in its entirety.

8. The statement summed up by indicating that we should impose the cap at £250 or in the alternative impose conditions on the Council to pay the reasonable costs of the Respondent.

9. A reply was submitted by the Council, dated 13th April 2016, which contained a number of exhibits. The Council maintained that the notice of intention was hand delivered to the flat address and it was not until August of 2014 that the Respondent notified them of a different address. The statement then went on to refer to the case of A2 Airways Housing Group. We were told that a feasibility study had been commissioned, a copy of which was included in the bundle. It was said that having received the notice of intention the Respondent had opportunity to deal with the matter.

10. We were told that a search of the Land Registry had discovered the address of 4 Baillie Close and that this had been purchased by the Respondent in March of 2008. Surprisingly, it is said by the Council, from 2012 onwards the Respondent had been paying service charges as and when required notwithstanding the suggestion that she was no longer living in the flat and therefore not receiving correspondence from the Council. It was said that the Respondent had made regular payments towards her service charge account since 2012 and that aside from County Court proceedings which have been stayed for this application no action had been taken by the Council against the Respondent for non-payment of service charges in this period. The conclusion addresses the lack of prejudice and lack of evidence produced by the Respondent to show that such prejudice had occurred. A number of other exhibits were attached. Of relevance are the stage 2 and 3 consultation papers and a statement of account.

11. We were also provided with a copy of a letter from Southwark Citizens Advice Bureau dated 27th April 2016 addressing the question of prejudice and a witness statement from Mrs Fagbodun dated 27th April. We noted all that was said.

12. Of interest was a copy of a letter that Southwark Council Home Ownership Unit had written on 18th October 2010 to Mrs Fagbodun at the Rainham address as well as a letter sent from Southwark Revenue and Benefits Service (Council Tax Section) again addressed to Mrs Fagbodun at the Rainham address.

13. A reply to this witness statement was made by the Council on 5th May 2016. This said that the London Borough of Southwark as a local authority is distinct from the Council as a landlord. They do not share databases and that if the Home Ownership Unit is to be informed of the change of address then it has to be done specifically in writing, which did not happen they say until 2014. It is said that the system would automatically update if new contact addresses had been provided but they had not been. It is said that the letter of 18th October 2010 must have been manually entered by the Council as it related to a specific point on alteration. The statement also makes the point that there had been no complaint by the Respondent prior to August of 2014 that she had not been receiving invoices, statements and notices. We noted all that was said in that statement.

HEARING

14. At the hearing the Council was represented by Miss Dowding an Enforcement Officer and Mr Cremin a Solicitor. Mr and Mrs Fagbodun were represented by Miss Dincgun from Southwark Citizens Advice Bureau.

15. Miss Dowding told us that the application was for retrospective dispensation on the basis that they did not believe any prejudice had been caused as a result of non-compliance. It was accepted that stages 2 and 3 had not been complied with. However, the Council believe that stage 1 had been served properly. We were told that the Council believed the works were necessary and that the Respondent had provided no evidence to the contrary. Accordingly, it is said that the Respondent is in the same position as if the regulations had been complied with.

16. Apparently the final bill is still awaited and proceedings are based on the estimated costs. Works are still undergoing and Miss Dowding could not tell us whether those to Havisham House had been completed. The action in the County Court was in respect of service charges under Section 27A of the Act and that we were dealing only with the Council's application for dispensation. It was confirmed that the Council thought that the claim in the County Court was for £19,868.30 as the invoice which had been produced included stage payments which had not yet fallen due.

17. Asked about the system for recording addresses we were told that it was not the council's policy to change an address without a specific request being made to do so. We were also told that a somewhat ambiguous statement went out on the service charge leaflet each year requesting leaseholders to notify the Council of any changes in their details. We were told that it was not in fact until February of 2016 that invoices were sent to the correct address. It seems that only came to light when the proceedings were being commenced, which in fact had started in

November of 2015. Asked how those proceedings had been served at the Rainham address we were told that the Council checked with the Council Tax Department who confirmed the Rainham address and that proceedings were therefore served at both properties.

18. The Respondent's case is that they disputed that stage 1 had been complied with. There was, they said, no evidence that the Respondent was required to specifically notify the Council in writing in respect of a change of address. We were told that Mrs Fagbodun had contacted the Council on a regular basis by telephone to deal with expenses and that she had a diary in which each monthly expense was recorded and it was for that reason that she had been paying the service charges. She had lived in the flat until 2008 and was therefore aware that costs had to be paid. She was of the view that the Council had been discriminatory against her, chasing her on a regular basis and were always "on my neck." We were told that the subject premises was being rented out and that she lived with her husband in Rainham. She had been a tenant with the Council from 1998 and had exercised her Right to Buy in 2004. She confirmed that she had notified the Council by telephone that she had moved and relied on the letter of 18th October 2010 from the Home Ownership Department, which went to her home address as evidence that the Council knew she was not living at the flat. She could not understand, therefore, why the records were not updated.

19. On her behalf Miss Dincgun suggested the Daejan case was not particularly relevant in current matters. In the Daejan case she suggested that the landlord there had taken notice at least in part of the procedures but in the current matter the landlord had completely failed to undertake consultation. She was asked whether the Respondent would have arranged for a surveyor to give advice had they known. The responses given were firstly that Mrs Fagbodun had the money to pay running costs and would have had the money to settle a surveyor's fee. However, this was not wholly supported by Mr Fagbodun. She told us that she was only aware that there was a liability when she received the invoice. This was in early 2015. Advice was sought of the CAB in Romford and subsequently from Southwark. She confirmed that there had been no reference to a surveyor in that time Miss Dincgun did tell us that Southwark CAB operated a pro bono arrangement with the RICS who produced reports free of charge. However, no referral to a surveyor had been made, Miss Dincgun said because of the time and the cost. Nonetheless, it was asserted that Mrs Fagbodun could have sought advice, could have got a surveyor to comment on the scopes of the work and the necessity. As an aside, Mrs Fagbodun told us that she was presently in receipt of benefits and when asked why in response to the invoice in February 2015 she had responded utilising the flat address rather than her home address, we received a somewhat uncertain response via Mr Fagbodun.

THE LAW

20. The law applicable to this application is set out below. We bear in mind also the terms of the Service Charge (Consultation Requirements) England Regulations 2003.

FINDINGS

21. There is no doubt that the council failed to comply with the regulations and did not serve the stage 2 and 3 notices. There is some dispute as to whether or not the stage 1 notice giving the initial intention was served on Mrs Fagbodun. There is a conflict of evidence. There is no doubt that by October of 2010 the Home Ownership Department had been provided with another address because they had written to that property dealing with issues other than service charge matters. It was said by Miss Dowding it is not unless a specific letter is sent with a change of address that these alterations are noted. The Council does not liaise between departments to confirm addresses. This apparently only occurs when court proceedings are being considered. Quite why this check could not be made each time service charge accounts are sent out is unclear. It is right, however, it was not until August of 2014 that a formal notification was sent advising the Council of the new address. Matters are further complicated by Mrs Fagbodun responding to the invoice in February of 2015 by way of a letter in March of 2015, which is sent from the flat address and not from the Rainham address.

22. We do not think it is really necessary for us to make a finding as to whether or not the initial notice was served. It is clear that the stage 2 and 3 notices were not and the question therefore we need to consider is whether there has been prejudice caused.

23. Mrs Fagbodun still has the right to challenge the need, suitability, payability and reasonableness of these major works. The County Court proceedings will no doubt address that point. All we are being asked to do is to determine whether or not dispensation should be granted so that the Council is not limited to recovering £250 of the bill in excess of £23,000. We have borne in mind the provisions contained in the judgement of the Supreme Court in Daejan Investments Limited v Benson and others [2013 UKSC14]. The lead judgment of Lord Neuberger in a majority judgement is provided. We set out a couple of paragraphs from the judgement which are relevant to this case. It is right to say the facts are not the same but the outcome needs to be viewed in the light of the Supreme Court findings.

24. In paragraph 42 Lord Neuberger says *"So I turn to consider Section 20ZA(1) in its statutory context. It seems clear that sections 19 to 20ZA are directed to ensuring that tenants of flats are not required (1) to pay for unnecessary services or services which are provided to a defective standard, and (2) to pay more than they should for services which are necessary and are provided to an acceptable standard. The former purpose is encapsulated in section 19(1)(b) and the latter in section 19(1)(a). The following two sections, namely sections 20 and 20ZA, appear to me to be intended to reinforce, and to give practical effect to, these two purposes. This view is confirmed by the titles to these two sections which echo the title of section 19."*

25. The judgment goes on at paragraph 44 to say as follows *"Given that the purpose of the requirements is to ensure the tenants are protected from (1) paying for inappropriate works or (2) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord 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."

26. The evidence we have from Mrs Fagbodun was uncompelling. In one breath she told us she would have employed a surveyor but in the next that she did not have the funds and was in receipt of benefits. Indeed, Mr Fagbodun was honest to indicate that he did not think a surveyor would have been appointed. Although Miss Dincgun attempted to rescue the position by saying that the Citizens Advice Bureau could retain a surveyor on a pro bono basis, we doubt very much that a surveyor would be prepared to undertake this work on a pro bono basis dealing with a contract in excess of £2m. It is, we find, very difficult for tenants involved in major works of this nature to satisfactorily challenge them. Trying to find an alternative contractor who could take on the works is well-nigh impossible for an individual and the costs of a surveyor being retained to advise on matters of this nature is also prohibitive.

27. The question, therefore, is was Mrs Fagbodun prejudiced within the meaning of Daejan because she was not aware of the consultation arrangements.

28. We have sympathy with Mrs Fagbodun and the fact that she faces a bill of this nature. However, she is entitled to challenge that in the County Court and is doing so.

29. Our finding, therefore, is that whilst it is more than unfortunate that the Council did not arrange for their systems to be properly updated, the fact that Mrs Fagbodun did not receive the consultation notices does not in our view result in any prejudice being caused because we do not accept that she would have undertaken any steps to deal with the contract if she had been made aware of same. We do not consider that she would have retained the services of a surveyor and her comments in respect of same are somewhat after the event. It is not what she said in her defence in the County Court and has been ventilated only since she has instructed the Citizens Advice Bureau in Southwark.

30. We are prepared to grant dispensation to the Council in these circumstances. We do, however, find their system of recording addresses somewhat dated given the existence of computers and databases and would suggest that they should take a more proactive approach to recording addresses of tenants rather than hiding behind a somewhat ambiguous instruction contained in the yearly service charge accounts. It may be that that could be more plain and understandable so that this issue does not arise in the future.

Andrew Dutton

Judge:

A A Dutton

Date: 23rd May 2016

ANNEX – RIGHTS OF APPEAL

1. 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 at the Regional Office which has been dealing with the case.
2. 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.
3. If the application is not made within the 28-day time limit, such application must include a request to 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.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie 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.