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LEASEHOLD VALUATION TRIBUNAL for the LONDON RENT ASSESSMENT PANEL

DETERMINATION BY THE LEASEHOLD VALUATION TRIBUNAL

APPLICATION UNDER S 20ZA OF THE LANDLORD AND TENANT ACT 1985, as amended

REF: LON/00AD/LSC/2011/O647

Address: **Cricketers Close, Stonewood Road, Erith, Kent DA8 1TU**

Applicant: **Riverstone Court (Erith) No 2 Residents Co. Ltd.**

Represented by: Brady Solicitors

Respondents: **The lessees of Cricketers Close**

Tribunal: **Mrs JSL Goulden JP**
Mr S F Mason BSc FRICS FCIArb

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1 The Applicant, who is the landlord of Cricketers Close, Stonewood Road, Erith Kent DA8 TU ("the property"), has applied to the Tribunal by an application dated 21 December 2011, and received by the Tribunal on 22 December 2011, for dispensation of all or any of the consultation requirements contained in S20 of the Landlord and Tenant Act 1985, as amended ("the Act"). A schedule of the Respondents was provided to the Tribunal.

2. The S20ZA application was made following a hearing before the Tribunal on 14 December 2011 under S27A of the Act in relation to external decorations undertaken at Flats 17 to 66 at the property during the service charge year 1 July 2010 to 30 June 2011. The present Applicant was the Applicant in respect of the hearing under S27A.

3. The Tribunal had issued its Determination in respect of the S27A application on 19 January 2012. Paragraph 54 of that Determination had stated *"In view of the Applicant's admission that no consultation had taken place and the sums involved were clearly above the relevant threshold, the Tribunal determines that the statutory limit applied. However, it is noted that a retrospective application for dispensation has been lodged with the Tribunal. The application is dated 21 December 2011 (and was received by the Tribunal on 22 December 2011) and this will be considered by the same members of the Tribunal at a later date"*

4. The property is described in the application as a *"purpose built block of 50 flats".*

5. A copy of the lease of Flat 49 Cricketers Close was in the case file. With no evidence to the contrary, it is therefore assumed that all the residential leases are in essentially the same form.

6 Directions of the Tribunal were issued without an oral Pre Trial Review on 5 January 2012. In those Directions it was stated, inter alia:-

"The Applicant contends that:-

(i) The majority of the monies used to pay for the external decorations were taken out of reserves, which were largely accumulated due to the sale of a strip of land held by Riverstone Court (Erith) No 2 Residents Ltd;
(ii) The monies demanded in excess of the funds used from the reserve fund did not exceed £250 per leaseholder.
(iii) Consultation was carried out [albeit that it may not have complied with the statutory requirements] and the leaseholders suffered no detriment or prejudice of any kind; and
(iv) Quotes were obtained and discussed at general meetings at which a decision was made which contractor to instruct".

7.The Applicant had requested a paper determination although the Tribunal's Directions had listed the matter for an oral hearing if any party had requested an oral hearing. No application was made for or on behalf of any of the Respondents for an oral hearing. This matter was therefore determined by the Tribunal by way of a paper hearing which took place on Tuesday 27 March 2012.

8. The Tribunal did not consider that an inspection of the property would be of assistance and would be a disproportionate burden on the public purse.

The Applicant's case

9.The Applicant's solicitors, Brady Solicitors, provided within their bundle, inter alia:-

- Written submissions and Supplementary written submissions, neither of which were dated.
- A witness statement of Lynn Knight, one of the Directors of the Applicant company.
- An email sent to the Directors dated 18 January 2010 detailing quotations from the contractors. It was confirmed that there had been a typographical error in the name of one of the contractors.
- Witness statement of David Woolley of PM Servies (London) Ltd, managing agents dated 16 January 2011 (sic)
- Speciman letter dated 10 January 2012 to leaseholders advising of the application for dispensation to LVT.
- Completed form supporting application for dispensation from the lessee of Flat 39 dated 14 January 2012.

10. In written submissions, the Applicant's amplified their case as set out in the Tribunal's Directions of 5 January 2012 as set out in paragraph 6 above. It was stated, inter alia *"due to the sale of a strip of land owned by the applicant, the reserve fund was of a substantial amount and it was therefore decided that the external decorations should be largely funded out of the reserve funds. The monies were not strictly speaking "paid" by the leaseholders but were funds obtained through the conveyance of the strip of land. The additional monies requested from each tenant amounted to less than £250 plus VAT. Therefore the leaseholders were not in any way financially prejudiced nor did they suffer any detriment although no formal Section 20 consultation procedure was carried out.In order to preserve the reserve fund and avoid expending large amounts of money on the Section 20 procedure, it was decided by a majority vote that the Section 20 procedure should not be carried out, on the basis that the leaseholders were consulted in any event and a number of quotes were obtained. The safeguards set down by S20 have therefore been adhered to as the leaseholders have been consulted and the requisite number of quotes provided. Leaseholders have also been given opportunity to make observations via the AGM process"*

11.In submissions, the Applicant's solicitors stated that dispensation should be granted by the Tribunal *"considering the financial impact it would have on the applicant company, the general agreement of all the leaseholders for the work to be carried out and the funds to be taken from the reserve fund and the monies in fact relating to the sale of a piece of land instead of monies paid by leaseholders".*

The Respondents' case

12.It appears from the case file that none of the Respondents had requested an oral hearing and only one lessee, the lessee of Flat 39, had submitted a form which indicated that he supported the landlord's application for dispensation from the full consultation process and was content for the Tribunal to make a determination on the basis of written representations, although he did not submit written representations.

13. No written representations were received by the Tribunal from or on behalf of any of the Respondents.

The Tribunal's determination

14. S 18(1) of the Act provides that a service charge is an amount payable by a tenant of a dwelling as part of or in addition to the rent, which is payable for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and the whole or part of which varies or may vary according to the costs incurred by the landlord. S20 provides for the limitation of service charges in the event that the statutory consultation requirements are not met. The consultation requirements apply where the works are qualifying works (as in this case) and only £250 can be recovered from a tenant in respect of such works unless the consultation requirements have either been complied with or dispensed with. Dispensation is dealt with by S 20ZA of the Act which provides:-

"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"

15.The consultation requirements for qualifying works under qualifying long term agreements are set out in Schedule 3 of the Service Charges (Consultation Requirements) (England) Regulations 2003 as follows:-

1(1) The landlord shall give notice in writing of his intention to carry out qualifying works –

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall –

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;

(d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure

(e) specify-

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the period on which the relevant period ends.

2(1) where a notice under paragraph 1 specifies a place and hours for inspection-

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

3. Where, within the relevant period, observations are made in relation to the proposed works or the landlord's estimated expenditure by any tenant or the recognised tenants' association, the landlord shall have regard to those observations.

4. Where the landlord receives observations to which (in accordance with paragraph 3) he is required to have regard, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made state his response to the observations.

16.The scheme of the provisions is designed to protect the interests of tenants, and whether it is reasonable to dispense with any particular requirements in an individual case must be considered in relation to the scheme of the provisions and its purpose.

17. As stated in the judgment in a Lands Tribunal case of **London Borough of Camden v The leaseholders of 37 flats at 30-40 Grafton Way (2008)** (one of the cases referred to by the Applicant):-

" The principal consideration for the purpose of any decision on retrospective dispensation must, in our judgment, be whether any significant prejudice has been suffered by a tenant as a consequence of the landlord's failure to comply with the requirement or requirements in question. An omission may not prejudice a tenant if it is small, or if, through material made available in another context and the opportunity to comment on it, it is rendered insignificant. Whether an omission does cause significant prejudice needs to be considered in all the circumstances. If significant prejudice has been caused we cannot see that it could ever be appropriate to grant dispensation"

18.The reasons for not entering into formal consultation as set out in the Applicant's submissions (paragraph 10 above) are wholly unsatisfactory. The duties of landlords in this respect are mandatory and cannot possibly be set aside on the basis either that the reserve fund should be preserved and/or the costs of the S20 consultation procedure should be avoided.

19.The Tribunal must have a cogent reason for dispensing with the consultation requirements, the purpose of which is that leaseholders who may ultimately foot the bill are fully aware of what works are being proposed, the cost thereof and have the opportunity to nominate contractors.

20.It was submitted that at the Annual General Meeting held on 20 May 2009, discussions had taken place as to how the external decorations proposed should be funded. At that meeting, it was decided that the works should be covered mainly by funds held in the reserve fund. Discussions were also held as to which contractors should undertake the work *"and the leaseholders were able to make observations, make nominations and in general provide their views on who should carry out the external decorations and who would provide good value for money".* This again will not suffice notwithstanding the contention that the spirit of S20 consultation had been followed. The Tribunal has concerns that not every leaseholder was present at that Annual General Meeting and therefore would not have been party to those discussions, although it is noted that minutes of that meeting were provided to all leaseholders and no adverse comments had been received.

21.Accordingly, the Applicant's submission *"therefore it is implicit that the leaseholder must have been in agreement with the works; if they were not in agreement then they would have taken steps to voice their dissent"* is rejected. There is no provision in the statutory requirements which permits implied consent. It was said *"the directors were aware of the obligation to carry out a Section 20 procedure, however, have decided (in order to save costs) to not undertake this procedure due to a consensus already having been reached with the leaseholders".* Since the directors were aware of their statutory requirements (and even if they were not), they are expected to satisfy those statutory requirements. It appears in this case that a deliberate decision was made by the Applicant to ignore its mandatory duties. The Tribunal does not accept that *"there has been full and complete transparency".*

22. The supplementary written submissions stated inter alia *"the Applicant's agent also affixed notices on all the notice boards in the blocks informing the leaseholders of the imminent external decorations. It also invited leaseholders to contact the Applicant's agent if they had any concerns or required clarification".* The Applicant is again reminded of its statutory obligations. It was stated that supplementary written submissions were received by the Applicant from the leaseholders of Flats 29, 32,45 and 47 but these were not provided to the Tribunal.

23.On the basis of the criticisms as set out above, the Tribunal was minded to dismiss the application. The Tribunal has, however, taken into account the fact that the Applicant is a tenant led organisation with little or no funds of its own.

24.Further, any of the Respondents who wished to have challenged the consultation process would have to persuade the Tribunal not only that they have been prejudiced by a material breach, but that such prejudice has been significant.

25.In this case, no evidence has been produced that any of the Respondents have challenged the consultation process.There has been produced to the Tribunal a copious amount of correspondence, emails and details of meetings, together with informal consultation documents and quotations. The Respondents appear to have been kept fully advised, albeit on an informal basis.

26.To paraphrase the judgment in the Grafton case, although the Tribunal finds in the present case that there has been *"a gross error"*, it does not consider that this error *"manifestly prejudiced"* the leaseholders *"in a fundamental way".*

27.The financial burden on the leaseholders is potentially onerous but in the circumstances of this particular case, the Tribunal determines that the leaseholders would not be substantially prejudiced by the Applicant's failure to consult fully or at all. In particular, the Tribunal notes that no objections have been received from or on behalf of any of the Respondents

28.On that basis, the Tribunal is satisfied that it is reasonable to dispense with requirements and determines that those parts of the consultation process under the Act as set out in The Service Charges (Consultation Requirements) (England) Regulations 2003 which have not been complied with may be dispensed with.

It should be noted that in making its determination, and as stated in paragraph 3 of the Tribunal's Directions of 5 January 2012, this application does not concern the issue of whether any service charge costs are reasonable or indeed payable by the lessees. The Tribunal's determination is limited to this application for dispensation of consultation requirements under S20ZA of the Act.

CHAIRMAN.....

DATE .....27 March 2012.....