

10401



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00BB/LSC/2014/0043**

Property : **Bridgeford Lodge, Frank Street,
London E13 8JQ**

Applicant : **Dencommon Limited**

Representative : **Steven Newman (in-house
Solicitor) of D&S Management
Services Limited**

Respondents : **The leaseholders of flats 21, 31, 35,
37, 39, and 41.**

Representative : **None**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal Members : **Mr L Rahman (Barrister)
Mr Barlow JP FRICS**

**Date and venue of
Hearing** : **6th November 2014 at 10 Alfred
Place, London WC1E 7LR**

Date of Decision : **17.11.14**

DECISION

Decisions of the tribunal

- (1) The tribunal is satisfied the applicant had complied with the consultation requirement under section 20 of the 1985 Act.
- (2) The tribunal determines that the works are within the applicants obligations under the relevant leases and the cost of the works are payable by the respondents under their respective leases.
- (3) The tribunal is satisfied, on the evidence before it, that the estimated cost for the works is reasonable.
- (4) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.
- (5) The tribunal orders the respondents refund any tribunal fees paid by the applicant within 28 days of the date of this decision.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether service charges are payable by the respondents.
2. The relevant legal provisions are set out in the Appendix to this decision.
3. A case management conference took place on 18.9.14 attended by the applicants representative and the representatives for flat 31. None of the other respondents attended. The tribunal determined that if a hearing was not requested the tribunal would determine the matter on the basis of written representations. A hearing was not requested therefore the matter was listed for consideration on the papers.

The background

4. The property which is the subject of this application comprises 12 self contained flats, 5 of which are owned by the applicant. The respondents all hold long leases. All the leases except for the lease to flat 21 are in substantially the same format.
5. The applicant is of the view that the main roof should be replaced and that there may be associated roof works. The estimated costs are £110,000 plus vat and professional costs.

6. The applicant undertook a consultation pursuant to section 20 of the 1985 Act. The applicant proposed to accept the estimate of Happe Contracts Limited and sent to all the respondents a proposed agreement ("the agreement") to be signed by each confirming that they had been consulted with regards to the proposed works, that the works were required, that the price was reasonable, and that the respondents would be responsible for their relevant share of the works. None of the respondents had replied to the proposed agreement therefore the applicant made the application to the tribunal to seek a declaration that it had complied with the consultation requirements and that the price obtained was reasonable and payable under each of the respondents' leases.
7. The representatives for flat 31 stated at the case management conference that they did not dispute that the consultation procedures had been complied with and that the works were necessary. However, they reserved their position on the estimated costs. The applicants representative confirmed in his statement dated 16.10.14 that the lessee of flat 31 had since then signed the agreement.
8. The applicant informed the tribunal at the case management conference that the lessee of flat 27 had signed the agreement and sought the tribunals consent to withdraw the application in respect of them.
9. The tribunal directed at the case management conference that any of the respondents who wished to dispute the applicants application shall send to the applicant, by 8th October 2014, a statement setting out whether they objected to the necessity of the works and the estimated costs, and if so, to provide alternative quotes or any other documents they wished to rely upon, and any legal submissions in support of the challenge to the service charges claimed if liability to pay is at issue.
10. The applicants representative confirmed in his statement dated 16.10.14 that none of the respondents served any statement or correspondence in response to the tribunals directions within the time prescribed.
11. The lessee of flat 39 wrote to the applicant in a letter dated 13.10.14 in which it was queried what guarantees there were that the estimated costs would not be exceeded, whether the payment would be included in the yearly service charge or whether there would be a separate charge, and whether there were any payment plans. The tribunal notes that no specific objections were raised as to the necessity of the works, the estimated costs, liability to pay, or whether there had been the necessary consultation.
12. The lessee of flat 41 signed the agreement on 28.10.14.

13. The tribunal / applicant had not received any evidence from the remaining lessees.

The issues

14. The tribunal identified at the case management conference the following issues to be determined:
 - (i) whether the applicant had complied with the consultation requirement under section 20 of the 1985 Act
 - (ii) whether the works are within the applicants obligations under the lease / whether the cost of the works are payable by the respondents under their respective leases
 - (iii) whether the estimated costs of the works are reasonable, in particular in relation to the nature of the works, the contract price and the supervision and management fees
 - (iv) whether an order for reimbursement of application / hearing fees should be made.
15. Having considered the bundle of relevant documents prepared by the applicant pursuant to the tribunals directions, the tribunal has made determinations on the various issues as follows.

Section 20 consultation

16. The applicant states the relevant Notices and estimates were served on the respondents by first class post and in addition they were also delivered by hand to the individual flats in the building and addressed to the relevant lessee.
17. An example of the "NOTICE OF INTENTION TO CARRY OUT THE WORK" dated 6.2.14 is on page 151 of the bundle. An example of the "STATEMENT OF ESTIMATES IN RELATION TO PROPOSED WORKS" dated 3.6.14 and the "NOTICE ACCOMPANYING STATEMENT OF ESTIMATES IN RELATON TO PROOSED WORKS" dated 3.6.14 are on pages 154 and 156 respectively. An example of the letter stating the applicant intended to enter into a contract with Happe Contracts Limited dated 22.7.14 is on page 237. The tribunal is satisfied that these letters satisfy the section 20 consultation requirements.
18. The tribunal noted that three of the respondents accept that the applicant has complied with the section 20 consultation requirements. A further respondent, whilst not stating that the consultation requirements have been satisfied, does not state that they have not

been complied with. The remaining three respondents have not responded to the Notices or to the tribunals directions.

19. The tribunal is satisfied the applicant had complied with the consultation requirement under section 20 of the 1985 Act.

Are the works within the applicants obligations under the lease and are the costs payable under the respective leases'

20. With respect to each of the flats, except flat 21, the applicant is obliged under clause 5(4) to repair the main structure of the building including the roof.
21. With respect to each of the flats, except flat 21, by virtue of clause 4(2) and the Fourth Schedule, each of the respondents is required to contribute one twelfth of the costs incurred.
22. With respect to flat 21, the applicant is obliged under clause 3 and the Fifth Schedule to keep the roofs in good and substantial repair and condition.
23. With respect to flat 21, under clause 2 and the Fourth Schedule, the respondent is required to pay an annual charge towards the cost to the applicant of complying with its covenant in the Fifth Schedule.
24. The tribunal noted that three of the respondents accept that the works are within the applicants obligations under the lease and the cost of the works are payable under their respective leases. A further respondent, whilst not stating that the works are within the applicants obligations under the lease and the cost of the works are payable under the lease, does not argue to the contrary. The remaining three respondents have not responded to the tribunals directions.
25. The tribunal determines that the works are within the applicants obligations under the relevant leases and the cost of the works are payable by the respondents under their respective leases.

Are the estimated costs of the works reasonable

26. The tribunal noted the applicant obtained two quotes and had chosen the cheapest of the two. Three of the respondents accept that the price for the works is reasonable. A further respondent, whilst not stating that the price of the works is reasonable, does not state that it is not. The remaining three respondents have not responded to the tribunals directions, namely, that if they wished to dispute the applicants application then they should set out whether they objected to the estimated costs, and if so, to provide alternative quotes.

27. The tribunal is satisfied, on the evidence before it, that the estimated cost for the works is reasonable.

Application under s.20C and refund of fees

28. The applicant made an application for a refund of the fees that had been paid in respect of the application / hearing. The tribunal noted the applicant had won in its application. However, the question that arises is whether it was reasonable for the application to be made, given that the applicant states that it had done everything required of it and none of the respondents had suggested otherwise. In view of the extent and cost of the works and the fact that none of the respondents had replied to the section 20 Notices, the tribunal found the applicant was understandably being cautious and in the circumstances it was not unreasonable for it to have made the application. The tribunal orders the respondents refund any fees paid by the applicant within 28 days of the date of this decision.
29. The respondent at the case management conference applied for an order under section 20C of the 1985. For the reasons given in the preceding paragraph the tribunal decline to make an order under section 20C. However, if and when the applicant seeks to recover any costs incurred in relation to this application, the respondents may challenge this by making an application to this tribunal. The tribunal makes no findings on the level of the costs as it has not been told what those costs are.

Name: Mr L Rahman

Date: 17.11.14

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 27A

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,

- (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

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.]

The Supreme Court in **Daejan Investment Limited v Benson et al** [2013] UKSC 14 set out the approach to be adopted on an application under section 20ZA(1) to dispense with compliance with the consultation requirements. It stated:

- The tribunal should focus on the extent, if any, to which the tenants were prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the landlord to comply with the regulations;
- That no distinction should be drawn between a "serious failing" and "a technical, minor or excusable oversight" save in relation to the prejudice it causes;
- That the financial consequences to the landlord of not granting dispensation is not a relevant factor when the tribunal is considering how to exercise its discretion under section 20ZA;
- The nature of the landlord is also not a relevant factor.

- The tribunal has the power to grant a dispensation on such terms as it thinks fit - provided that any such terms are appropriate in their nature and effect;
- In effect the tribunal can conclude that it would be reasonable to grant a dispensation if the landlord accepts appropriate conditions;
- This can include a condition as to costs - eg that the landlord pays for the tenants' reasonable costs incurred in connection with the landlords application under section 20ZA.

The Supreme Court further set out the approach to be adopted when prejudice is alleged by tenants owing to the landlords failure to comply with the consultation requirements. It stated:

- The tribunal should identify the prejudice, if any, that the tenants would suffer if an unconditional dispensation was given. It should also identify the extent of that prejudice;
- The tribunal should view the tenants arguments in this respect, sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less (or for instance, that some of the works would not have been carried out or would have been carried out in a different way) if the tenants had been given a proper opportunity to make their points;
- The more egregious the landlords failure, the more readily would a tribunal be likely to accept that the tenants had suffered prejudice;
- Once the tenants have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it;
- Save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the consultation requirements;
- On the other hand, tenants have an obligation to identify what they would have said, had the consultation requirements been met.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.

- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.