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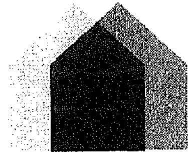

RESIDENTIAL PROPERTY TRIBUNAL SERVICES

LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985, SECTION S27A AND 20A

REF: LON/00AN/LSC/2011/0142

PROPERTY:	**FLAT 1, 255 MUNSTER ROAD LONDON SW6 6BW**
Applicant:	ALEXANDER STIRLING
Respondent	DAVID NEIL RILEY
Appearances	Both the Applicant and Respondent appeared in person and represented themselves
Date of Application:	24th February 2011
Date of Pre-Trial Review and Directions:	5th April 2011
Date of Hearing:	7th & 8th July 2011
Date of Decision:	5th August 2011
Members of Tribunal:	Mr S Shaw LLB MCI Arb Mr T Sennett MA FCIEH Mr O Miller BSc

DECISION

Introduction

1. This case involves an application made by Alexander Stirling ("the Applicant") in respect of Flat 1, 255 Munster Road, London SW6 6BW ("the Property"). The Applicant is the leasehold owner of the property and the application is for a determination of the liability to pay and reasonableness of certain service charges. The application is made pursuant to the provisions of Section 27A of the Landlord and Tenant Act 1985 ("the Act"). The property is the first floor flat at 255 Munster Road. The ground floor is a restaurant and there is a further flat above the property on the second floor. The property and the other constituent parts of 255 Munster Road is owned by David Neil Riley ("the Respondent"). The Applicant is the leasehold owner of the property, and the flat above the property is owned by a Mr Jon Meadows.

2. A dispute has arisen over some works which were carried out during May 2010. Those works will be referred to below, but essentially the Applicant's case is that the works required compliance with the provisions of Section 20 of the Act (dealing with consultation), and that those provisions in this case were not complied with. Quite apart from the failure to comply with the statutory provisions he in any event challenges the need for and cost of a substantial part of the works.

3. So far as the Respondent is concerned, he essentially accepts that the Section 20 consultation procedure was not complied with. However he contends that the

works carried out was of an urgent nature and that he did not, as he put it, have the "luxury of time" to comply with this procedure. He also contends in effect that the Applicant is prevaricating over payment for these works, and that his motivation is essentially lack of funds rather than any substantive objection to the works themselves.

4. The Tribunal informed the Respondent, who was acting in person, of the statutory power on the part of the Tribunal to dispense with non-compliance with Section 20 if it is satisfied that it is reasonable so to dispense with the requirements. At the hearing the Respondent made such an application and the Tribunal will therefore consider whether and if so to what extent it would be reasonable to dispense with the requirements in accordance with the Act. The full cost of the works was £32,619.87p. The Applicant's share of the cost is 30% in accordance with his lease and thus the Respondent contends that the sum of £9,698.52p by way of service charge is due from the Applicant to him in respect of the work. It is common ground that no part of this sum has to date been paid.

5. It is proposed to summarise briefly the evidence heard by the Tribunal, both from the Applicant and the Respondent, and thereafter to give the Tribunal's findings in respect of the issues arising in this case.

The Applicant's Case

6. The Applicant informed the Tribunal that the first intimation he received to the effect that these works were contemplated, was by an email from Bushells Estate Agents (Managing Agents of Mr Meadows the other leaseholder) dated 7th April

2010. In fact it transpired that the work had been contemplated and discussed, according to the Applicant, between Mr Meadows, the Respondent and Bushells from in or about February 2010. The Respondent received an email confirming the need for a survey on 23rd February 2010 and a structural engineer, namely Mr M Rehman, had prepared such a report following an inspection and survey carried out on 24th February 2010. This had been followed by the obtaining of various quotations for major works, including that of Charles Walshe Property Services (dated 11th March 2010) who were the contractors eventually used by the Respondent. Quotations were obtained from other contractors at the end of March and beginning of April 2010 but the Applicant was not included in any of the exchanges in this regard.

7. In the email of 7th April 2010 the decision to proceed with Charles Walshe Property Services is effectively presented to the Applicant as a fait accompli, and the Applicant is merely requested to contact the Respondent urgently in order to arrange his contribution towards the cost of the works.

8. The Applicant told the Tribunal that he was taken aback by the suggestion that he must pay over £9,600 as a matter of urgency, and that he considered the proposed works and cost both to be excessive. He telephoned Bushells and was informed that the upper flat was allegedly *"falling down"* with cracks in supporting walls and joists falling through. He was concerned by this and on 9th April, having made contact with the tenants, himself inspected the upper flat and, in short, so far as he was concerned, with the exception of an isolated damp patch in the bedroom, could find no evidence supporting the description given to him by Bushells.

9. On 8th April 2010 he emailed the Respondent and informed him that his financial circumstances were not such that he could pay the sum demanded, took issue about the extent of some of the works, but also suggested that the flank wall did not require re-plastering, some brickwork at the front of the building did require attention and should be dealt with at the same time as the major works.

10. On 10th April 2010, the Applicant's evidence was that he spoke to the Respondent and told him that the vertical crack on the flank wall had not changed in some ten years.

11. On 27th April 2010 the Applicant received a further email from Bushells which opened with the encouraging words *"Great news!"* but then informed him that the *"great news"* was that Charles Walshe Property Services had agreed to proceed with the works at a cost totalling £32,318.38p including VAT. The Applicant's contribution would therefore be £9,698.52p. He was asked to arrange a bank transfer in that sum forthwith.

12. Taking the matter shortly thereafter, there were further email exchanges in which the Applicant reiterated his impecuniosity, but also took issue with the cost and scope of the works. So far as he was concerned, those comments were simply brushed aside. He was chased repeatedly for his contribution and notwithstanding his objections, was telephoned by Bushells on 19th May 2010 to be advised that the work was to start the very next day. He emailed the Respondent immediately to say that he believed the re-plastering of the whole of the flank wall was a total waste of

money and pointing out also that the structural engineer did not suggest any recent signs of subsidence requiring such urgent or comprehensive work. It is not necessary for present purposes to go into the detail of subsequent emails. Suffice it to say that the work proceeded notwithstanding the Applicant's protestations. He was vigorously pursued by the Respondent for his contribution which the Respondent and the other leaseholder Mr Meadows, in the absence of any contribution by the Applicant, subsidised on his behalf. Those exchanges continued during the latter half of 2010 and include an email from the Applicant to the Respondent sent on or about 22nd December 2010 in which again the Applicant contests the nature and cost of the works and points out specifically that no application was made pursuant to the Landlord and Tenant Act 1985 "for dispensation of Section 20 consultation requirements."

13. In early February 2011 the Respondent informed the Applicant that he had taken legal advice and that in default of receiving the Applicant's contribution to the cost of the works he would be proceeding to "cancel" (that is to say forfeit) the Applicant's lease of the property. It was at about that time that the Applicant made his application to the Tribunal.

The Respondent's Case

14. In a written statement expanded in oral evidence before the Tribunal, the Respondent told the Tribunal that he had owned the freehold of the property since 2005. He said that he did have an awareness of the Act and the consultation provisions. He was aware that the leaseholder was entitled to be consulted in respect of works of this kind. However, he told the Tribunal that such consultation

was problematic in this case because of the urgency of the work. He had been informed on the 23rd February by the other leaseholder Mr Meadows that water was *"pouring through the roof and the eaves"* and that Mr Meadow's tenants in the property were having to endure conditions in which they were living underneath a polythene sheet to prevent some of the water penetrating into the property. Apparently Mr Meadows was greatly distressed and his (Mr Meadow's) agents had stated that the work was urgent.

15. The Respondent had relied upon Mr Meadows, who, with assistance of Bushells, had obtained a structural engineer's report. The Respondent had accepted that the report does not expressly mention any kind of urgency nor does it refer to tenants subsisting within the other flat underneath plastic sheeting. Notwithstanding this, there were some extremely wet weather conditions during that period and Mr Meadows informed the Respondent that he thought he would get into trouble for charging rent for a flat that was *"sub-standard"* and thus these works were urgently carried out.

16. The Respondent told the Tribunal that he concluded *"right, we're going to have to do something here."* He instructed the Agents to obtain quotations and in early April sent those quotations to the Applicant. He repeated in evidence to the Tribunal that he did not have "the luxury of time". Although there was a different emphasis as far as the Respondent was concerned, the history of the progress of the matter did not greatly differ from that recounted by the Applicant. The Respondent confirmed that he and Mr Meadows had effectively subsidised the Applicant's contribution towards the works and he also accepted that the Section 20

consultation procedure had not been complied with. Upon the Tribunal informing him that an application could be made for Section 20ZA dispensation, he confirmed that he would like to make such an application. He also told the Tribunal that he had discussed the position with his solicitor at or about the time of the commissioning of the works and that in normal circumstances notices would be needed of the familiar kind. The advice he received was apparently to the effect that "*If you think it's appropriate to get on with the work, then you should do it.*"

17. The Respondent emphasised that the Applicant's objections at the time were substantially of a financial nature and he was generally aggrieved that the Applicant had made no contribution of any kind towards the cost of the works.

18. As to the urgency of the position, he accepted that the structural engineer's report mentions no such urgency, but contended that the urgency occurred later (i.e. after the report) when the upper flat became soaked and one of the toilets could no longer be used. Notwithstanding this, neither of Mr Meadow's tenants were required to move out of the property. Mr Meadows himself gave no evidence to the Tribunal either in writing or in person.

19. The Respondent himself had never seen inside the upper flat and accepted that he had relied entirely upon Mr Meadow's Agents, namely Bushells, and the fact that so far as he was concerned, Mr Meadows would not be offering to pay these monies unless he considered the works necessary. Given the circumstances he felt that he should not be before the Tribunal at all.

Analysis and Findings of the Tribunal

20. The Tribunal finds as a fact, indeed there was no issue, that the Section 20 consultation procedure was not complied with in this case. It follows that the statutory cap of recoverable costs applies in this case unless the Tribunal is satisfied for the purposes of Section 20ZA that it is reasonable to dispense with the consultation requirements in respect of all or part of the works.

21. As to the issue of Section 20ZA, the Tribunal has had regard to the recent decision of the Court of Appeal in the case of *Daejan Investments Limited and Benson and Others* [2011] EWCA CIV 38 and to the guidance contained therein. At paragraph 73 Lord Justice Gross deals with the question of prejudice to the leaseholders in that case and upholds the original Tribunal decision to the effect that the curtailment of the consultation itself amounts to significant prejudice. Each case, however, obviously turns on its own facts and in this particular case, the Tribunal in terms asked the Applicant whether his case was that no part of the works or costs was in any way reasonable or whether he accepted that part of the work and its concomitant cost was indeed reasonable. He told the Tribunal (at any rate initially) that his objection was essentially to the costly hacking off of existing plaster and full re-plastering of the flank wall at the property. Indeed this is the tenor of much of his email and other exchange with the Respondent or the Agents referred to. He accepted that the flat roof work was necessary and reasonable. In subsequent questions and answers he retracted this concession, however the Tribunal had the impression, on his evidence, that whether or not there had been appropriate consultation, this part of the work was not a matter of great contention as far as he was concerned.

22. On the balance of the evidence before the Tribunal, the Tribunal concludes that it is reasonable to dispense with the consultation requirements in respect of that part of the works which relates to the roof repairs. On the facts of this case, the Tribunal does not consider that the failure formally to consult within the provisions of Section 20 has significantly prejudiced the Applicant in this regard, taking into account his evidence as referred to by the Tribunal, and the gist of the email exchanges alluded to above and contained within the hearing bundle. The cost of the works referable to the roof can be found at page 107 of the hearing bundle in the context of the Charles Walshe Property Services quotation. A sum of £4,760 plus VAT is referable to the relaying of a new roof felt surface and associated works and there is a further sum of £2,100 plus VAT referable to the repair of the roof edges, parapet wall and coping stones. These sums, together with the VAT amount to £8,060.50p and there is a further necessary sum of £2,950 (upon which no VAT is referred to) for scaffolding, bringing the sum up to £11,010.50p. The Applicant's 30% contribution in accordance with the terms of his lease towards this expenditure at the rate of 30% is £3,303.15p.

23. So far as the balance of the works referred to in the quotation, the Applicant has made no concessions and the Tribunal is not satisfied on the evidence before it that the Respondent has made out a sufficiently compelling case for a dispensation order in this regard. There was no expert or any direct lay evidence that these were indeed urgent, or that they could not have been consulted upon in the ordinary way. Indeed the Applicant's evidence (which the Tribunal accepts) was that he did indeed inspect, and although he is not an expert, there was nothing to support the alarm

being expressed. It follows that only the statutory cap of £250 in relation to the remainder of these works is recoverable as against the Applicant.

Conclusion

24. For the reasons set out above, the Tribunal determines that the sum of £3,303.15p together with a further £250, amounting to £3,553.15p is the sum which is reasonable and payable in respect of these works by the Applicant to the Respondent. There was no application for costs by either party, and the circumstances of the case, and the Tribunal's findings, are such that the Tribunal would have been disinclined to make any such orders in any event.

Legal Chairman: S. Shaw

Dated: 5th August 2011