7597

HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL UNDER SECTIONS 27A AND 20C OF THE LANDLORD & TENANT ACT 1985

Case Reference:	**LON/00BK/LSC/2011/0789**
Premises:	Flat 9, Radnor Lodge, Sussex Place, London W2 2TA
Applicant (leaseholder):	Mr Kooros Daneshvar
Respondent (landlord):	Radnor Lodge Investments Limited
Represented by:	Gordon & Co. Limited (Managing Agents)
Leasehold Valuation Tribunal:	Ms F Dickie, Barrister, Chairman Mr D Banfield FRICS
Date of paper determination:	28 February 2012

Summary of Decision

(i) Unless an application under s.20ZA of the Landlord and Tenant Act 1985 ("the Act") is made to the Leasehold Valuation Tribunal and granted, the service charge contribution payable by the Applicant in respect of the major works is limited to £250.

(ii) An order is made under s.20C prohibiting the landlord from recovering any costs of the present proceedings as a service charge from the Applicant.

(iii) The tribunal orders the Respondent to refund the application fee of £200 to the Applicant.

Preliminary

1. By an application received on 22 November 2011 the Applicant leaseholder of the subject premises seeks a determination under section 27A of the Act as to the service charges for major works payable in the year

2011, invoiced to him in the sum of £5776.15. The Respondent is represented by the managing agent Gordon & Co. (not Douglas & Gordon as set out on the application).

2. Both parties have agreed to the tribunal determining this matter on the papers. The Applicant lives in Dubai. The subject premises are a 1 bedroom flat in a purpose built block of flats. It is apparent from the Schedule of Notice of Leases on the official copy of the Land Registry Title dated 10 February 2006 that there are 15 flats in total in the block. An inspection was not considered necessary by the tribunal.

3. The works in question were internal repairs and redecoration to the common parts of the block. The Applicant's case is that when he was consulted under section 20 of the Act he made observations on the works, but that these were not taken into consideration by the managing agents, and that his contribution should therefore be reduced to £250.00. Directions were issued by the tribunal on 24 November 2011, in which a single issue was identified for determination, namely whether or not there was proper compliance with section 20 of the Act. Where not set out in the body of this decision, the relevant statutory provisions are included in the attached schedule.

Evidence and Submissions of the Parties

4. The managing agent observes that no objections were received from the Applicant in response to the Notice of Intention dated 23 February 2011. A Notice of Estimates was issued to the tenants dated 21 June 2011, which gave four estimates obtained for the work. An accompanying notice invited the leaseholders "to make written observations in relation to any of the estimates by sending them to 6 London Street, W2 1HR" before the end of the consultation period on 21 July 2011. This is the address of the managing agent.

5. By an email dated 23 June 2011 to Gordon & Co. the Applicant stated as follows:

> "I am the owner of Flat 9, Radnor Lodge. Please see my comments below further to our recent telephone conversation on the subject.
>
> I am very surprised at the potential cost of this repair/redecoration work which you are proposing to do at Radnor Lodge. Bear in mind around 2-3 years ago we were forced to pay around GBP 5,000 in addition to the service charge for some other repair work. It is not acceptable to be charged these sums on a regular basis as the owner of a small property. I am raising an official objection to this proposed work. I suggest you totally re-think the scope of work to be done and if some of this work is not really necessary then perhaps we should

not do it all in one go. I also feel the cost could be reduced considerably if you widened the search for contractors and invited many more quotations.

I am not prepared to pay such large amounts for this work. Please take this into consideration and consult me before proceeding. I live in Dubai so you can email me or call me on ....."

6. In a letter dated 2 August 2011 the managing agent wrote to the leaseholders in the following terms:

> "We are writing to advise that we have received no objections to the Statement of Estimates in relation to the proposed internal works distributed on 21 June 2011"

The letter further advised that the second cheapest tender had been accepted (and gave reasons for not accepting the lowest priced one). After further email correspondence from the Applicant, an email to him dated 2 September 2011 from the managing agent stated "When it comes to your objection I am sorry that it was not taken into consideration".

7. In the Respondent's statement of case dated 8 December 2011 prepared in compliance with the directions of the tribunal the managing agent acknowledges receipt of the email from the Applicant dated 23 June 2011 in response to the estimates. It refers to subsequent correspondence with him, though there is no evidence of any response to the email of 23 June 2011 which predates the letter to leaseholders dated 2 August 2011.

Decision and Reasons

8. Section 20(1) of the Act provides

"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) a leasehold valuation tribunal

9. Section 20 applied to the works in question as the relevant costs incurred exceeded the appropriate amount of £250, pursuant to section 20(3). The relevant consultation procedure is set out in Schedule 1 of the Service Charges (Consultation Requirements)(England) Regulations 2003. Regulation 5(1) requires the landlord to prepare at least two proposals in respect of the work in accordance with the remaining provisions of that paragraph. Regulation 6 requires the landlord to give notice in writing of

proposals prepared under paragraph 5 to each tenant, inviting "the making, in writing, of observations in relation to the proposals" and specifying the address to which such observations may be sent (as well as the relevant period within which they must be delivered and the date on which the relevant period ends). Paragraph 7 provides:

"Where, within the relevant period, observations are made in relation to the landlord's proposals by any tenant or recognised tenants' association, the landlord shall have regard to those observations".

10. Pursuant to Paragraph 8(1)(b) the landlord has a duty, within 21 days of entering into an agreement for the works, give notice in writing to the tenants:

"where he has received observations to which (in accordance with paragraph 7) he is required to have regard, summarise the observations and respond to them or specify the place and hours at which that summary and response may be inspected".

11. The tribunal has observed that the Applicant's objections refers to a conversation with a member of staff at the managing agent, and not to having by the date of writing received the Notice of Estimates (which was sent to him at a UK address). It is certainly clear from the content of the email that the Applicant had information about the proposed cost of the work. Notably the Respondent in its statement of case acknowledges that this email was sent in response to the estimates. The tribunal is therefore satisfied that the email did make observations on the landlord's proposals in response to the invitation accompanying the Notice of Estimates dated 21 June 2011.

12. The tribunal notes that the Notice of Estimates invited written observations to a physical address, while Applicant's objections were sent by email. However, there is clearly a history of email correspondence between the parties, the Applicant living abroad. The Respondent raised no objection during the relevant period for observations as to the mode of communication, and since it did not insist at that point on postal communication the tribunal is satisfied that (if there existed any irregularity as to the form of the observations) it was waived. The landlord has in any event not argued in these proceedings that it had no duty under section 20 and Paragraph 7 and 8 of Schedule 1 by virtue of the observations having been made by email. On the respective cases put forward by the parties the tribunal finds that the Applicant made observations on the proposals, and that the landlord had a statutory duty to have regard to them under Paragraph 7 and to respond to them in writing to the tenants under Paragraph 8. There is no dispute that these steps were not taken.

13. Accordingly, the tribunal finds that there has been a failure to comply with the consultation provisions required by section 20 of the Act. By statute the relevant contribution of the tenant is therefore limited to £250. On an application under s.27A the tribunal has no discretion to disapply that limit.

14. If the landlord wishes to recover from the tenant an amount in excess of the relevant contribution of £250, it must now apply to the Leasehold Valuation Tribunal under s.20ZA of the Act for dispensation from the consultation requirement which in this case has been breached. The provisions of that section are set out in the schedule to this decision. The tribunal has the power to make such an order where it considers it reasonable to do so. There would appear on the present evidence to be some merit to such an application. The tribunal has no power to make an order under s.20ZA unless an application is made.

15. The leading case on the test to be applied in determining such an application is **Daejan Investments Ltd v Benson and Others (2011)**, in which the Court of Appeal considered that the following factors are relevant to the Leasehold Valuation Tribunal's exercise of its discretion under s.20ZA(1) to dispense with statutory consultation:

    a. The financial effect of the grant or refusal of dispensation is an irrelevant consideration when exercising the discretion.

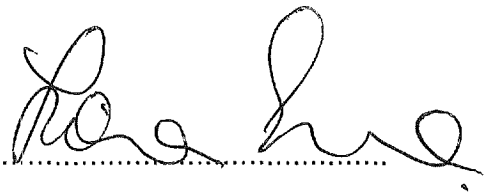
    b. All other things being equal, the following situations might commend the grant of dispensation: the need to undertake emergency works; the availability, realistically, of only a single specialist contractor; a minor breach of procedure, causing no prejudice to the tenants.

    c. A less rigorous approach may be justified in respect of lessee owned/controlled landlords, but this is not relevant to the present case.

    d. Significant prejudice to the tenants is a consideration of the first importance in exercising the dispensatory discretion.

Section 20C

16. The Applicant seeks a determination by the tribunal under section 20C limiting the landlord's ability to recover any costs of these proceedings through the service charge. Neither party has made representations as to the recoverability of such costs under the terms of the lease, and the Applicant having been successful in his application, the tribunal considers it appropriate to make the order sought, as well as an order that the Respondent refund the £200 application fee paid by the Applicant.

Signed 

Ms F Dickie, Barrister

Chairman

Dated 28 February 2012

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 a Leasehold valuation 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 a Leasehold valuation 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 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 leasehold valuation 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 a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the

proceedings are concluded, to any leasehold valuation 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.

Section 20ZA(1)

Where an application is made to the 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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).