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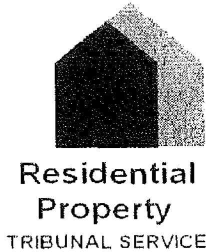


LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 SECTION 27A

Ref: LON/00AS/LSC/2010/0218

12 Dell Farm Road, Ruislip, HA4

Mr J Brennan	**Applicant**
Dell Farm Management Company Limited	**Respondent**

Date of hearing:	19 July 2010
Tribunal:	Mr M Martynski (Solicitor) Mr M Cartwright JP FRICS Ms J Dalal
Appearances:	Mr J Brennan Mr V Poncia (Leaseholder and Respondent's Chairman) Mr N Cook (Leaseholder and Respondent's Secretary) Ms C Vaughan (Leaseholder and Respondent's Director) Mrs J Harris (Leaseholder and Respondent's Director) Ms T Jolliffe (Leaseholder and Member of Respondent)

DECISION

Decision summary

1. The Tribunal finds that:-
   (a) There was a failure to comply with statutory consultation requirements in connection with works to guttering with the result that the Applicant's contribution to the cost of those works is limited to £50.00 rather than the cost charged to him of £866.61.
   (b) The lease does not allow the Respondent to claim legal charges of £151.66 from the Applicant and accordingly those charges are not payable by him.

(c) Service charges in respect of gardening and cleaning are payable by the Applicant.

2. The Respondent must pay to the Applicant the sum of £125.00 being half the fees paid by him to the Tribunal in respect of this application.

3. An order is made pursuant to section 20C Landlord and Tenant Act 1985 ('the Act') limiting any costs of these proceedings incurred by the Respondent to be placed on the service charge to fifty per-cent of those costs.

Background

4. This matter concerns a very long running dispute (which has already resulted in one previous hearing before a differently constituted Tribunal and at least one County Court case) between the Applicant and the Respondent over various issues concerned with the service charge and the running of the Respondent company.

5. The Applicant is the long leaseholder of a flat on the top floor of a small block of flats. That block forms part of a small development consisting in total of 24 flats and 12 houses. The Respondent is the freehold owner of the development and the leaseholders and householders are all members of the Respondent company.

6. In his application, the Applicant raised four challenges to the service charge. One of those challenges concerned an allegation that the Respondent had not complied with its statutory obligation to consult leaseholders regarding works to guttering that were carried out in or about the early summer of 2003.

7. At the pre-trial review that took place on 27 April 2010, in the event that the Tribunal found that the Respondent had not complied with its statutory consultation requirements, the Respondent was given permission to make an application to the Tribunal for dispensation from these requirements pursuant to section 20ZA of the Act.

8. The Respondent proceeded to make that application and the application was joined to Mr Brennan's application. Both applications were listed to be heard by this Tribunal on the final hearing dates.

9. Unfortunately, prior to the hearing before this Tribunal, no-one appears to have appreciated the fact that the works in question were carried out prior to the coming into force of the new statutory consultation procedures and section 20ZA (October 2003).

10. At the time that the works were carried out, the relevant statutory provision was section 20(9) rather than section 20ZA of the Act. Given that section 20ZA was not in force at the time of the works, an application for dispensation cannot be made under that section. The application for dispensation must be made pursuant to section 20(9) of the Act. Unfortunately, the Tribunal has no jurisdiction to deal with an application under section 20(9), that application has to be made separately to the County Court.

11. Accordingly therefore, although the Tribunal heard and dealt with Mr Brennan's application regarding the works and decided that there had been no statutory consultation (see more on this below), it could not deal with the Respondent's application for dispensation. In the circumstances the Respondent had to withdraw the application (and will be asking the Tribunal to refund the fees paid in respect of it).

12. After the hearing the Respondent made a request to submit further evidence on the question of consultation. It reasoned that, as it was expecting to make an application under section 20ZA of the Act at the final hearing, it may not have prepared for that hearing the best case possible to try to convince the Tribunal that there had been consultation that had complied with the relevant law at the time. The Tribunal agreed to the request and allowed the submission of further written evidence on this question from both parties. Both parties made further submissions and accordingly this decision is based on both the evidence presented at the hearing and the later written submissions from the parties.

The issues and the Tribunal's decisions

The works to the guttering in 2003, cost £20,798.67 – Applicant's share £866.61

13. The Applicant originally put the figure for these works at £22,651.72 and his share of that at £943.82. During the hearing it was established that the actual costs of the guttering work was the lower figure in the heading to this section. The higher figure relied upon by the Applicant was arrived at by adding the cost of two extra pieces of roof works carried out by the contractors employed for the guttering who utilised the scaffolding for the roof works whilst it was in place for the guttering works.

14. It was the Applicant's case that his share of the costs of the guttering works was limited to £50.00[1] given that the Respondent had failed to comply with the relevant statutory provisions at the time and to consult leaseholders regarding the works prior to the contract for those works being placed with the contractors.

15. The statutory consultation requirements in force at the time essentially required the Respondent to give written notice to all leaseholders of the proposed work and to provide details of two estimates for that work. Leaseholders must be told that they have one month in which to comment on the proposed works.

16. The Applicant gave evidence to the Tribunal to the effect that, the first that he knew of the work was when the scaffolding was being put up to facilitate the work. He also pointed to a letter that he wrote to the Respondent dated 4 June 2004, approximately a year after the work was done, in which, referring to the work; he said:-

> Can you give me a detailed explanation why I was not notified in advance of this work, why estimates of costs were not provided in advance in accordance with the requirements of The Housing Act and given that the gutters and rainwater pipes were completely replaced in year 1996-1997 at a cost of £5150-00 why was it necessary to undertake this work again?

[1] The relevant amount to which total costs are limited as a result of non-consultation under the law applicable at the time was the greater of £1,000 or £50 multiplied by the number of tenants liable to pay the service charge

17. The Applicant gave detail to the importance of, what he alleged, to be the failure to consult him. In his written submission the Applicant states;

> My contention remains that the second replacement gutter project was not service chargeable at all as it was intended as an aesthetic improvement to replace the existing wood with UPVC and not done through any maintenance necessity. I suggest the alleged additional work requirement, discovered by and brought to their attention by the contractor, only became necessary because of damage by the contractors own unsupervised workmen climbing the roof. The necessity for this additional work was not evident before commencement. As previously stated the entire guttering system was satisfactorily replaced to a wider diameter in 1996/1997.....

18. Regardless of whether he was right or wrong, the Applicant held strong views on the matter which underlines the importance of consultation.

19. The Respondent's representatives argued that, on the balance of probabilities, the Respondent had followed the statutory consultation procedure. The Respondent was hampered by a lack of documentation dating from that time. The Respondent did not use managing agents and all the work was done by leaseholder directors who stored records in their flats. They did not have sufficient space to store records for long periods of time.

20. The evidence that the Respondent produced to support its case, both at the hearing and in the further submissions was weak and unconvincing in the face of the Applicant's evidence on this issue. It is relevant to note that none of the Respondent's members present at the hearing were directors at the relevant time. Set out below are the facts and submissions relied upon by the Respondent (in support of its contention that there must have been adequate consultation complying with the relevant law at the time) with the Tribunal's comments on those submissions:-

(a) The Respondent's board was advised of the need for consultation by solicitors in 1999.
Comment: Evidentially, this sheds no real light on whether there was actual consultation that complied with the statutory requirements.

(b) Mr Poncia gave evidence that, as far as he can recall, he did get written notification about the works prior to them starting. Unfortunately, he could not recall any details from that notification.

(c) Various residents had signed statements that they had received notification of the works and were generally aware of them at the time and or that they were happy with the way in which the buildings were run and the general level of consultation.
Comment: Those statements did not go into sufficient detail regarding the form and content of the notice received to come anywhere near showing that there had been formal consultation that met statutory requirements.

(d) There were notes recording that various estimates were being/had been obtained and an undated financial director's report advising that the contract in question had been placed
Comment: Again, this fell far short of showing that there had been formal consultation with all leaseholders that met statutory requirements.

(e) Minutes of meetings of general meetings discussing the proposed works would have been delivered to all leaseholders (the Applicant denied getting any minutes).
Comment: Even if minutes were delivered as stated, this did not constitute statutory consultation.

(f) *Comments from a County Court Judge dealing with a previous case between the parties in which the Judge commented on the clear channel of communication between directors and residents.*
Comment: Again, this fell far short of showing that there had been formal consultation with all leaseholders that met statutory requirements.
(g) *The Dell Farm Management newsletter referring to 'quotes' being obtained for the work.*
Comment: Once again, even if 'quotes' were obtained there is still a lack of evidence as to formal consultation in respect of them.
(h) *The 'onus' of proof lies with the Applicant to show that there was no consultation and he has not discharged that burden.*
Comment: There is no set onus or burden of proof as such in proceedings before the Tribunal. The Tribunal considers and weighs the evidence presented to it without any general presumption about a burden of proof. In this case, for the reasons given, the Tribunal is satisfied that, on the one hand, the Applicant has shown evidence to support his contention that he was not consulted, and on the other, the Respondent has not provided any real compelling evidence that it did consult, in the manner required by statute, with <u>all</u> service charge payers
(i) *The Tribunal was urged to treat the Applicant's evidence as unreliable given that he stated that the Respondent was keeping minutes from him which he then admitted in another part of his evidence he had received.*
Comment: The Tribunal found the Applicant to be, for the most part, a reliable witness. Even if he had not been correct about receiving minutes, the Tribunal accepted other important parts of his evidence regarding consultation as set out above.

21. Whilst the Tribunal has sympathy for the leasehold directors who try their best to run the development, it was clear from documents provided to the Tribunal at the hearing that the Respondent had been aware of the statutory consultation requirements having previously been alerted to their existence by its solicitors. Whilst lack of storage space may be an issue, the Respondent's directors were able to produce other documents that pre-dated the works in question. It was significant, in the Tribunal's view, that the Respondent was unable to produce copies of any letter to any leaseholder specifically consulting on the proposed work and all the estimates obtained in respect of it.

22. It has to be stressed that what we are dealing with here is whether or not there was consultation as required by statute at the time, that is compliance with the clear procedure then in force. There either was such compliance or there was not. There is no half-way house. Just because the Respondent can show that it is generally good at consulting residents does not show that it, on a specific issue, did actually comply with a rigid statutory procedure.

23. Had the Tribunal been dealing with an application for dispensation, all the facts and submissions put forward by the Respondent would have been relevant, however, for the reasons given above, the Tribunal has no jurisdiction to consider such an application.

Legal Fees - £3639.84, Applicant's share - £151.66
24. These were legal fees incurred in the year ending 31 March 2004. The Tribunal were shown two solicitor's invoices dated 5 February and 3 July 3003 amounting in total to £3111.59.

There were no other invoices to make up the balance. Both bills related to the commencement and continuation of litigation against the Respondent in the County Court for service charge arrears. The Applicant's objection to the charges was that there was no power under his lease for the Respondents to charge legal fees of this nature to the service charge account.

25. The Respondent pointed to clause 2(22) of the lease that obliged the Applicant to pay the legal fees in connection with the preparation and service of a forfeiture notice. There is no other clause in the lease that was clear enough to allow legal charges to be charged as service charges.

26. The Tribunal finds that clause 2(22) of the lease is of no assistance to the Respondent in making these fees payable by the Applicant because, first; clause 2(22) allows legal fees of the nature described to be claimed directly against a leaseholder, not via the service charge; second, neither of the invoices in question relate to the preparation and service of a section 146 notice; third, there is no indication that the balance of the sum in question for which no invoice is available relates to the preparation and service of a section 146 notice.

Gardening and cleaning fees for the years 2003-2009

27. The Applicant had no issue with the quality of the work done, he was concerned that both items were carried out under long term contracts with the contractors concerned and that the proper statutory consultation had not taken place with regard to the contracts[2] (and further that both contractors were connected with some leaseholders).

28. The Tribunal rejects the Applicant's challenge for the following reasons:-

(a) On reviewing the documentation in respect of each contract it was clear that both contracts were on a month to month basis and that they could be terminated on a months notice. Neither therefore was in the Tribunal's view, a long term agreement.
(b) In any event, both contracts were entered into prior to October 2003 which is when the obligation to consult leaseholders regarding such contracts became law. No consultation was therefore required in respect of them.
(c) Even if there needed to be consultation, neither contract was for an amount that exceeded the threshold (£100) that would trigger the need for consultation; the highest yearly amount for gardening was £2880 which would give a contribution for the Applicant of £96.00, the highest yearly amount for cleaning was £2142 which gives a contribution for the Applicant of £89.25

Costs and fees

Costs

29. The Tribunal takes the view that there were four challenges to; (a) guttering works; (b) legal fees; (c) cleaning; (d) gardening. The value of gardening and cleaning challenges were substantial. The Applicant has won on the first two challenges and lost on the second two. It is appropriate therefore for the Tribunal to make an order under section 20C Landlord and Tenant Act that only fifty per cent of the costs incurred, or to be incurred, by the Respondent in

[2] Section 20ZA(2) Landlord and Tenant Act 1985

connection with these proceedings before the Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

Fees

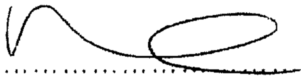
30. For the same reasons, the Tribunal orders the Respondent to pay to the Applicant the sum of £125 being half the amount of the fees that he has paid to the Tribunal in the course of this application.

Penalty costs

31. The Tribunal has no power other than to award up to £500 costs in consequence of bad behaviour by one party to the proceedings, in the course of those proceedings. The Tribunal does not make any such order. There has been no behaviour on the part of either party to justify such an order.

Final comments

32. The Tribunal hopes that this brings an end to the challenges brought by the Applicant in relation to current and future service charges. The Tribunal feels that it is time for the Applicant to realise that it is in the best interests of all leaseholders to work together and it is hoped that he will use the considerable energy that he has put into these and the previous proceedings to working with, rather than against, his fellow leaseholders.



Mark Martynski
Tribunal Chairman
14 September 2010

Relevant law referred to in this decision

LANDLORD AND TENANT ACT 1985

20.(As in force prior to October 2003)—

(1) Where relevant costs incurred on the carrying out of any qualifying works exceed the limit specified in subsection (3), the excess shall not be taken into account in determining the amount of a service charge unless the relevant requirements have been either—

(a) complied with, or

(b) dispensed with by the court in accordance with subsection (9);

and the amount payable shall be limited accordingly.

(2) In subsection (1) "qualifying works", in relation to a service charge, means works (whether on a building or on any other premises) to the costs of which the tenant by whom the service charge is payable may be required under the terms of his lease to contribute by the payment of such a charge.

(3) The limit is whichever is the greater of—
(a) [£50][2], or such other amount as may be prescribed by order of the Secretary of State, multiplied by the number of dwellings let to the tenants concerned; or
(b) [£1000][3], or such other amount as may be so prescribed.

(4) The relevant requirements in relation to such of the tenants concerned as are not represented by a recognised tenants' association are—
(a) At least two estimates for the works shall be obtained, one of them from a person wholly unconnected with the landlord.
(b) A notice accompanied by a copy of the estimates shall be given to each of those tenants or shall be displayed in one or more places where it is likely to come to the notice of all those tenants.
(c) The notice shall describe the works to be carried out and invite observations on them and on the estimates and shall state the name and the address in the United Kingdom of the person to whom the observations may be sent and the date by which they are to be received.
(d) The date stated in the notice shall not be earlier than one month after the date on which the notice is given or displayed as required by paragraph (b).
(e) The landlord shall have regard to any observations received in pursuance of the notice; and unless the works are urgently required they shall not be begun earlier than the date specified in the notice.

(5) The relevant requirements in relation to such of the tenants concerned as are represented by a recognised tenants' association are—
(a) The landlord shall give to the secretary of the association a notice containing a detailed specification of the works in question and specifying a reasonable period within which the association may propose to the landlord the names of one or more persons from whom estimates for the works should in its view be obtained by the landlord.
(b) At least two estimates for the works shall be obtained, one of them from a person wholly unconnected with the landlord.
(c) A copy of each of the estimates shall be given to the secretary of the association.
(d) A notice shall be given to each of the tenants concerned represented by the association, which shall—
(i) describe briefly the works to be carried out,
(ii) summarise the estimates,
(iii) inform the tenant that he has a right to inspect and take copies of a detailed specification of the works to be carried out and of the estimates,
(iv) invite observations on those works and on the estimates, and
(v) specify the name and the address in the United Kingdom of the person to whom the observations may be sent and the date by which they are to be received.
(e) The date stated in the notice shall not be earlier than one month after the date on which the notice is given as required by paragraph (d).
(f) If any tenant to whom the notice is given so requests, the landlord shall afford him reasonable facilities for inspecting a detailed specification of the works to be carried out and the estimates, free of charge, and for taking copies of them on payment of such reasonable charge as the landlord may determine.
(g) The landlord shall have regard to any observations received in pursuance of the notice and, unless the works are urgently required, they shall not be begun earlier than the date specified in the notice.

(6) Paragraphs (d)(ii) and (iii) and (f) of subsection (5) shall not apply to any estimate of which a copy is enclosed with the notice given in pursuance of paragraph (d).

(7) The requirement imposed on the landlord by subsection (5)(f) to make any facilities available to a person free of charge shall not be construed as precluding the landlord from treating as part of his costs of management any costs incurred by him in connection with making those facilities so available.

(8) In this section "the tenants concerned" means all the landlord's tenants who may be required under the terms of their leases to contribute to the costs of the works in question by the payment of service charges.

(9) In proceedings relating to a service charge the court may, if satisfied that the landlord acted reasonably, dispense with all or any of the relevant requirements.

(10) An order under this section—
(a) may make different provision with respect to different cases or descriptions of case, including different provision for different areas, and
(b) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

20C Limitation of service charges: costs of proceedings

(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 Lands 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 Lands 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.

20ZA Consultation requirements: supplementary

(1) 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.

(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

Service Charges (Consultation Requirements) (England) Regulations 2003/1987

4.— Application of section 20 to qualifying long term agreements
(1) Section 20 shall apply to a qualifying long term agreement if relevant costs[1] incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100.
(2) In paragraph (1), “accounting period” means the period–
(a) beginning with the relevant date, and
(b) ending with the date that falls twelve months after the relevant date.
(3) [In][2] the case of the first accounting period, the relevant date is–
(a) if the relevant accounts are made up for periods of twelve months, the date on which the period that includes the date on which these Regulations come into force ends, or
(b) if the accounts are not so made up, the date on which these Regulations come into force.
[
(3A) Where–
(a) a landlord intends to enter into a qualifying long term agreement on or after 12th November 2004; and
(b) he has not at any time between 31st October 2003 and 12th November 2004 made up accounts relating to service charges referable to a qualifying long term agreement and payable in respect of the dwellings to which the intended agreement is to relate,
the relevant date is the date on which begins the first period for which service charges referable to that intended agreement are payable under the terms of the leases of those dwellings.
][3]
(4) In the case of subsequent accounting periods, the relevant date is the date immediately following the end of the previous accounting period.

Cheryl Reid

From: LONDONRAP
Sent: 13 September 2010 12:04
To: Cheryl Reid
Subject: FW: Request for s20ZA refund

From: Nick Cook [mailto:mr.nickcook@googlemail.com]
Sent: Monday, September 13, 2010 11:54 AM
To: LONDONRAP
Cc: Vincent Poncia; Christine Vaughan; tessajolliffe [tessajolliffe]; Jean Harris; Peter Arends; Sushma Madan
Subject: Request for s20ZA refund

RE: LON/00AS/LDC/2010/055
LON/00AS/LSC/2010/0218

Dear Mrs Reid,

I am writing to request a refund of £350 which we paid for a S20ZA application made in a letter connection with hearing reference LON/00AS/LSC/2010/0218. Your reference for the S20ZA application is LON/00AS/LDC/2010/055. Our letter accompanying the cheque and completed S20ZA application form was dated 25 May 2010.

The background to this request is:

On the advice given to Dell Farm Management Company at a pre-Trial review held on 27 April 2010, we applied for a S20ZA application for exemption from S20.

In the event this application was ruled invalid at the tribunal hearing held on 19 July 2010. The reason given was that the relevant legislation was not current when the project (for which our application was made), took place.

At the Tribunal the chairman, Mr Martynski confirmed that we were eligible for a refund because our S20ZA application had not been considered.

Yours sincerely,

Nick Cook,
Secretary DFMC,
18 Dell Farm Road,
Ruislip,
Middlesex,
HA4 7TX

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