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HM Courts & Tribunals Service

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985, section 20ZA and section 20C

LON/OOAP/LDC/2013/0044

Address:	**Queen's Mansions** **59 Queens Avenue** **Muswell Hill** **London** **London N10 3PD**
Applicant(s):	**Daejan Investments Ltd**
Represented by:	**Hammond Bale Solicitors**
Respondent(s):	**Mr J S Benson** **Mr D P Lapes** **Mr A N Gray & Mrs Gray** **Mr P Walder** **Aldenspring Ltd**
Recognised Tenants Association:	**Queens Mansions Residents' Association (Secretary: Ms Marks)**
Date of hearing	**11 June 2013**
Appearances:	**Mr M D E Bale** **Mr Lapes & Ms Marks**
Tribunal:	**Mrs V T Barran** **Ms A Hamilton-Farey**
Date of decision:	**18 June 2013**

DECISION

1. The tribunal is satisfied that it is reasonable to dispense with all of the consultation requirements contained in Schedule 4 Part 2 to the Service Charges (Consultation etc) (England) Regulations 2003 in relation to the works carried out on May 12 2013 to the render to the exterior of Queens Mansions.

2. Such dispensation is made on condition:

   (a) that the cost to the leaseholders of such works is reduced by £250.00
   (b) that Daejan Investments Ltd thoroughly explore with Mitre Construction Ltd (the contractors who carried out major works to building) whether they could or should contribute to the cost of remedial works, either under the terms of any guarantee or as a gesture of goodwill
   (c) that each party bear their own costs of this application.

3. The tribunal determines that an order under section 20C of the Landlord and Tenant Act 1985 should be made and the costs incurred by the landlord in connection with these proceedings may not be taken into account in determining the amount of any service charge payable by the respondents.

REASONS

Background

4. The property which is the subject of this application is an Edwardian purpose built block of 7 flats above three shops.

5. The applicant, Daejan Investments Ltd ("Daejan") owns the freehold of the building. The five respondents hold long leases of flats which require the

landlord to provide services and the tenants to contribute their costs by way of a fixed percentage of a variable service charge.

6. On 10 May 2013 Daejan applied to this tribunal under section 20ZA of the Landlord and Tenant Act 1985 ("the Act") for a determination to dispense with the consultation requirements in relation to qualifying works. It was contended that the case should be dealt with urgently:

> *"The remedial work involves hiring a 'cherry picker' to survey and hammer test all render and stonework on the front elevation of all four storeys, of Queens Mansions and to remove loose areas of render and make safe and clear from site. It is proposed carry out this work on Sunday 12 May 2013.*
>
> *The Applicant has been in ongoing correspondence with the Queens Mansions Residents Association who reported the condition of the render on the 18th April 2013. It has since written to each of the lessees about the need to carry out the work and to advice of the date on which it is to be done.*
>
> *Dispensation is sought due to the urgency of the work. Following a site visit by a Senior Building Surveyor from Haringey Council on the 30th April 2013, he noted that sections of render to the exterior of Queens Mansions above the public highway were defective and were in a potentially dangerous condition. The Applicant has been told by Haringey Council that it must arrange for urgent repairs within 14 days to avoid service of a Dangerous Structures Notice under section 62(2) of the London Building Act (amendment) Act 1939. If the Applicant carries out full consultation this will prolong the period during which the building is a danger to the public."*

7. Directions were issued in which the tribunal identified the issue as whether or not it is reasonable to dispense with the statutory consultation requirements. Directions made it clear that this application does not

concern the issue of whether any service charge costs will be reasonable or payable.

8. Directions required the applicant to convene a meeting with the leaseholders to explain and discuss the works. This was done on 22 May 2013. Directions also required both parties to send in bundles of documents and to supply statements/representations including as to whether it may be appropriate for the Tribunal to grant dispensation "on terms".

9. Subsequently the leaseholders have made applications under section 20C of the Act.

10. We are aware of the considerable history re service charges on this block culminating in the Supreme Court decision *Daejan Investments Ltd v Benson and Others* [2013] UKSC 14.

11. We thank both parties for their provision of well ordered bundles and we thank Mr Bale who appeared for Daejan and Mr Lapes and Ms Marks who appeared for the leaseholders, for their courtesy and help at the hearing. References in [ ] are to page numbers in bundles: A for applicant's bundles and R for respondent'.

The law

12. **Section 20(1)** of the Act provides that, where the 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.

13. **Section 20ZA(1)** of the Act provides that, 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.

14. **Section 20ZA(2)** defines "qualifying works" as "works on a building or any other premises" and "qualifying long term agreement" as (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.

15. **Section 20(3)** of the Act provides that section 20 applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount, defined by regulation 6 of the Regulations[1] as an amount which results in the relevant contribution of any tenant being more than £250.
Part 2 of Schedule 4 to the Regulations contains the consultation requirements for qualifying works for which public notice is not required.]

16. **S20ZA** does not require a Tribunal to make any determination on the costs of the works or the proposed agreement.

Preliminary matter

17. Under our current procedural Regulations[2] the tribunal "***shall*** *give notice of the application to any person, whose name and address the tribunal has, who the tribunal considers is likely to be significantly affected by the application....*

and ***may*** *give notice to any other person it considers appropriate."*

18. The description of the property in the application had not referred to any commercial units.

[1] Service Charges (Consultation Requirements) (England) Regulations 2003

[2] Reg 5 Leasehold Valuation Tribunals(Procedure) (England) Regulations 2003

19. On reading the papers we found that the block consists of seven flats, five owned by the respondents and two not let on long leases, with three commercial shop units at ground floor level. On enquiry at the hearing it emerged that these shop units are let on ten year leases and do contribute to the service charges of the block. It may have been appropriate to give the shop owner notice, but after discussion with the parties we decided on balance that it was not sufficiently unfair to the shop units for the purposes of the present application involving comparatively low value works not to give them notice and it would be inconvenient and costly for those attending to adjourn. We gave our decision to proceed orally.

Matters in dispute in the substantive application as originally made.

20. It was common ground that the applicant has not formally complied with any of the relevant requirements of the Service Charges (Consultation Requirements) (England) Regulations 2003 (Schedule 4 part 2) although an exchange of emails and letters had taken place between some leaseholders and agents for Daejan including provision of two estimates. It was agreed by both parties that the tribunal should dispense with the consultation requirements, although the leaseholders wanted dispensation to be on terms. Daejan did not.

21. We therefore need to determine:

(a) whether to dispense "on terms"
(b) and if so which terms?
(c) whether to make an order under section 20C of the Act?

The applicant's case

22. In their written representations Daejan submit that the work was extremely urgent, that there was insufficient time to conduct section 20 consultation and that in the circumstances it is reasonable to dispense with

the consultation requirements under section 20ZA of the Act. They further submit that, given the limited amount of costs incurred and the agreement by the leaseholders that the works should be carried out as a matter of urgency, it is not appropriate or proportionate that dispensation should be granted subject to any terms.

23. At the hearing Mr Bale amplified this position. He did not agree with the assertion of the leaseholders that Daejan had been at fault. Mr Creedon had attended immediately on being informed by an occupier of falling masonry and then on 23 April Mr Shelvin a building surveyor from the managing agents had inspected. Two estimates had been obtained but they did not want to serve a Notice of Intention until they knew more. There had been a reasonable level of consultation appropriate to the cost of the works. Mr Bale considered that the Supreme Court proposals for dispensation on terms did not apply in a case such as this, where the landlord had to respond urgently and carry out emergency works.

The respondents' case

24. To summarise their written representations, the leaseholders accepted that the tribunal should grant dispensation, but on terms that:

(a) Daejan shall not recover pursuant to the Respondents' leases (whether as service charge, administration charge (within the meaning of Schedule 11 to the Commonhold and Leasehold Reform Act 2002) or otherwise any costs or expenses incurred in respect of its application for dispensation with Case ref: LON/00AP/LSC/2013/0044; and

(b) Daejan pays the leaseholders' reasonable costs in investigating and challenging the application for dispensation.

25. The leaseholders submit that Daejan should have adopted a "truncated" consultation process and that having done so, the leaseholders would have said:

> The emergency make-safe works should be carried out immediately, and at Mitre's expense; (they were the contractors who carried out previous major works);
> It is not necessary to undertake a hammer test at this time;
> It is not necessary to hire a cherry picker at this time;
> The make-safe work can be carried out on a immediately from the balcony;
> In the event of (2) and (3) the work can be carried out on a weekday;
> Both elevations should be tested at a later date;
> Both elevations require further inspection and remedial work to be carried out at Mitre's expense.

Our Decision on dispensation "on terms".

26. Given the agreement of the parties we had no difficulty in determining that it is reasonable to dispense, but mindful of the Supreme Court guidance we asked the parties to focus on the approach suggested by Lord Neuberger in *Daejan v Benson para 44:*

> *Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.*

27. We do not agree with Mr Bale that the LVT should not impose terms in a prospective application: Lord Neuberger again:

> *However, the very fact that s 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further, the circumstances in which an s 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules.*

28. We did not find that Daejan had acted altogether appropriately here. There *was* time for some formal consultation; a notice of intent could have been served. There could have been a meeting. The leaseholders could have been given an opportunity to comment on the appropriateness or otherwise of the works, to propose their own contractor or comment on the proposed use of a cherry picker, the hammer test and the Sunday working.

29. Although we find the use of a cherry picker and the hammer test to be sensible and not "inappropriate works" , we consider the leaseholders had adequately discharged the burden of proof and had established to our satisfaction that the works could have been carried out on a weekday given the wide road.

30. We consider that the terms that would be reasonable would firstly be that Daejan reduce the costs by £250.00. We arrive at this figure because of the comparable evidence given to us on the difference in cost of the use of a cherry picker on a weekday compared with a Sunday [45R] (£550 /300).

31. We cannot comment on whether Mitre should have borne the expense, but we do consider Daejan should have and still can explore this. The leaseholders have shown "*a credible case for prejudice*" in that had some

consultation taken place they could have investigated this with the Managing agents more fully. So the second term we impose is that Daejan shall fully investigate the leaseholders' assertion that Mitre could be asked to contribute to the cost of remedial works, either under the terms of any guarantee (which Mr Bale said had expired) or as a gesture of goodwill, given the history of this block and the regular nature of their work for Daejan. It is possible that the costs will therefore be nil or reduced. Daejan shall provide a copy of their letter to Mitre and the reply before these service charges are demanded. We come to these conclusions

> *"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".*

32. The Supreme Court decision envisaged terms that a landlord could be required to pay its own costs of making and pursuing an application to the LVT for dispensation, and to pay the tenants' reasonable costs in connection of investigating and challenging that application. Mr Bale opposed such a term here, as explained above.

33. As explained more fully in our decision on the section 20C applications (see below) we consider that it is fair to keep this matter cost neutral with each party bearing their own costs. We have therefore not imposed a term that Daejan should pay the leaseholders costs (modestly claimed at £200.00) but we do impose a term that Daejan should bear their own costs of these proceedings. We do not know if the leases allow for administration costs to be imposed on individual leaseholders in connection with litigation costs but for the avoidance of doubt, our decision precludes this. (This was a term mentioned by the respondents, but the imposition of such costs was not argued by Daejan.)

Should the application be extended?

34. On the day before the hearing Daejan submitted an 'amended' application asking the tribunal to extend the dispensation to include scaffolding works for 8 weeks at a cost of £4,812 + VAT with an additional hire cost of £287.50 + VAT per week. There was an alternative quotation for 6 months hire. It was Daejan's case that this was necessary so that the building will be fully protected from falling render and stonework. They did not agree to dispensation on terms that they should contribute to the leaseholders' costs or that the landlord's costs should not be borne by the leaseholders.

35. Mr Bale argued that it would be convenient and proportionate to deal with this today and that it all flows from the same problem [48A]. He conceded that rather than present danger there was a possibility of danger from falling render. There was no loose render at the moment. [47A]

36. The leaseholders objected to this amended application, pointing out that the works relate to the Notice of Intention for *new* major works served on 23 May [A 50]. They alleged that the information had been deliberately withheld from them with no warning of the apparent imminent danger at the meeting on 22 May, nor in the new notice of intention served 23 May, nor in the written statement of case of 30 May.

37. We decided not to allow extension of the application as requested. Firstly we agree with the leaseholders that the works relate to those described in broad terms in the Notice of Intention for new major works. As such it may be possible for the full consultation to include this scaffolding issue.

38. Secondly we could find no evidence of imminent danger before us. Indeed the purpose of the works done on the 12 May had been to make the roof area safe. The building Inspector from Haringey had not served any notice despite his awareness of the problems and earlier warnings.

39. Finally the leaseholders are unrepresented parties, albeit with considerable experience of service charge litigation, and with only one working days notice, they would be unlikely to be able to respond to the application adequately, including presenting evidence on any possible prejudice. In our view the extended application would simply be unfair on them. We gave this part of the decision orally.

Section 20C of the Act: limitation of service charges in relation to the costs of the proceedings

40. The leaseholders applied under Section 20C of the Act for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with these proceedings before the leasehold valuation tribunal, are not to be regarded as relevant costs in determining the amount of any service charge payable by the tenant or any other person specified in the application.

41. Mr Bell stated that the landlord's costs of making the application under 20ZA to the Tribunal are recoverable under the leases. He considered that the landlord had the right bring the application because of the emergency nature of the work. A dutiful landlord would have to make an application for dispensation as incidental to the carrying out of the works. If a landlord could not recover such costs it would be a disincentive to carrying out works. However in appropriate cases a landlord could be deprived of costs, for example where they were at fault. That was not the case here as this was a building with a problem.

42. Mr Bale had not used Counsel but had done the work himself, including dealing with long written representations from the leaseholders. On being asked by the Tribunal for a rough estimate of the landlord's likely costs, Mr Bell could not give one. When asked whether the costs would be in hundreds or thousands of pounds he replied "not hundreds".

43. Mr Lapes argued that the landlord could have consulted tenants in advance and indeed could have settled this matter as they had done on previous occasion in 2001 [R bundle pages 85/86]. Furthermore there had been no need to instruct solicitors. Mr Shelvin of Highdorn Ltd, the managing agents could have made the application as part of his "day job". The tenants had to reply to the application in detail and provide a full response.

Our decision on 20C

44. As we explained to the parties at the hearing the tribunal may make such order as we consider just and equitable in the circumstances. This is a broad power and our discretion must be exercised in the light of the facts of each case. There has been case law on the subject and there is no presumption either in favour or against an order being made. Such orders do not necessarily "follow the event". Offers of settlement and the circumstances and conduct of parties are among matters courts have been considered to be relevant.

45. We noted that the quotation from RR trading was dated 25 April, with the second quotation sent on 1 May. So the costs were known before the application to this tribunal was made on 10 May. We accept that the case of *Phillips v Francis*[3] cited by Mr Bale has made landlords cautious about consultation. It is understandable that even on small costs they consider that they may need to look at annual contributions, but in a case where (as here) the known costs fall under the threshold of £250 we question whether it was proportionate for solicitors to be employed to make a 20ZA application. In our experience most prospective applications to the LVT are made by managing agents / surveyors.

46. We further question why no attempt to settle was explored given the leaseholders' offer of settlement and the small sums involved?

[3] Phillips and another v Francis and another [2012] EWHC 3650 (Ch)

47. This case involves a comparatively small amount of costs. As discussed at the hearing it is likely that the individual contributions of leaseholders will fall beneath the £250 threshold. Although there was disagreement as to the precise figure, with Mr Bell contending for 25% and Mr Lapes for 33%, it was agreed that the commercial tenants pay a significant percentage of the total for the block. We only saw the lease of flat 1 but, with a total cost of £2,220.00 (being the cost of works plus VAT) divided by say 75% and then by 13.37% the contribution of flat 1 will be £222.61.

48. We take the view that the landlord could have served notice of intention at an early stage and engaged in partial or "truncated" consultation. It is surprising to us that the landlord did not do this and waited from 16 April when first alerted by an occupier to the problems with the render until 9 May (one day before the application to the tribunal) before officially contacting/consulting leaseholders. They could have organised a meeting (as suggested by Lord Neuberger) and indeed Mr Lapes noted that they did so with remarkable speed when directed to by this tribunal.

49. We also consider it would have been be reasonable for the landlord to have informed the leaseholders in the letter sent to them on 17 May [page 36 A] of the report from RR Trading Ltd of the *same* day [page 48 A]. We also question why this was not discussed at meeting ordered by the tribunal and held on 22 May. It would appear from the papers that there may have been instructions issued to RR Trading dated 3 May although Mr Bale thought this date was a typo.

50. Finally once the leaseholders had made an offer on 1 June [p 42R] to agree to the dispensation (on terms) the landlord could have attempted *some* negotiation with them given the relatively modest requests. In our view then a joint approach to us to determine dispensation on the basis of the papers would have avoided further costs of preparation and hearing (fees and costs).

51. Given the facts found above and set against the considerable history of previous difficulties with the landlord tenant relationship in this building, we determine that it is just and equitable to make an order under section 20C.

52. The tribunal determines that such an order should be made and the costs incurred by the landlord in connection with these proceedings may not be taken into account in determining the amount of any service charge payable by the respondents.

CHAIRMAN..... **18 June 2013**