



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

**Case References** : LON/00AM/LSC/2014/0138 &  
LON/00AM/LSC/2014/0069

**Property** : 1 Lavington Close, London E9 5HF

**Applicant** : London Borough of Hackney

**Representative** : Metropolitan Housing Trust Ltd

**Respondent** : Ms T Mitchell

**Representative** : In person

**Types of Applications** : &  
For the determination of the  
reasonableness of and the liability  
to pay a service charge  
(0138)

**Types of Applications** : &  
To dispense with consultation  
requirements under s. 20 of the  
Landlord and Tenant Act 1985  
(0069)

**Tribunal Members** : Tribunal Judge J E Guest  
Mr L Jarero BSC FRICS  
(chartered surveyor)

**Date and venue of  
Hearing** : 03/07/2014  
10 Alfred Place, London WC1E 7LR

**Date of Decision** :

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## DECISION

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### **Decisions of the tribunal**

- (1) The tribunal determines that the sum of £1,535.67 is payable by the Respondent in respect of major works undertaken in 2008-09.
- (2) The Tribunal makes the dispensation order under section 20ZA of the Landlord and Tenant Act 1985.
- (3) The tribunal makes the determinations as set out under the various headings in this Decision.
- (4) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.
- (5) The tribunal refuses the Respondent's application for costs.
- (6) Since the tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the Clerkenwell and Shoreditch County Court.

### **The applications**

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2009-10.
2. Proceedings were originally issued in the Northampton County Court under claim no. 3QZ08445 in respect of outstanding service charges of £2,200.76. The claim was transferred to the Clerkenwell and Shoreditch County Court and then in turn transferred to this tribunal, by order of District Judge Manners on 09/12/2013 (and issued on 11/12/2013).
3. At a case management conference ("*CMC*") on 01/04/2014, it was established that the some of the outstanding service charges had been paid by the Respondent following the issue of the county court claim and that the remaining amount of £1,535.67 related to major works undertaken in 2008-09. The Respondent indicated that the costs of the major works were disputed on the basis that: (a) the Applicant had not

complied with the consultation requirements of s. 20 of the 1985 Act; and (b) the costs of the major works had not been properly demanded, as the Applicant had not been served a summary of tenant's rights and obligation in breach of s.21B of the 1985 Act. It was also established that the balance of the service charges of £665.09 paid by the Respondent were still in dispute but that these service charges would be the subject of a separate application by the Respondent under section 27A of the 1985 Act. The Applicant also indicated at the CMC that it would make an application for dispensation in relation to the s. 20 consultation.

4. On 22/05/2014, the tribunal received the Applicant's application for dispensation. At a further CMC on 28/05/2014, the tribunal directed that the two applications be consolidated and heard together on 03/07/2014.
5. The relevant legal provisions are set out in the Appendix to this decision.

### **The hearing**

6. Counsel, Mr A Carr, represented the Applicant. Also present on behalf of the Applicant was its in-house solicitor, Mr H Dervish, Mr D Fisher (Metropolitan's Head of Leasehold Services) and Ms A Everton (Metropolitan's Leasehold and Service Charge Officer). Ms Everton gave oral evidence. The Respondent appeared in person.
7. The parties had each prepared a bundle of documents that was considered by the tribunal prior to the hearing. In addition, the tribunal was handed a skeleton argument prepared by Mr Carr immediately prior to the hearing that was also considered by the tribunal. The hearing lasted nearly one day.

### **The background**

8. The property, which is the subject of the applications, is a one bedroom flat situated on the ground floor of a four-storey block of flats (*"the building"*) consisting of a total of 23 flats. The building was constructed in 2001.
9. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
10. The Respondent holds a long lease of the property, which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

## **The issues**

11. It was identified that the relevant issues for determination related to the costs of the major works undertaken in 2008-09 and concerned:
  - (1) whether the Applicant was entitled to a determination order to dispense with some of all of the consultation requirements;
  - (2) if so, whether the works were necessary and reasonably incurred; and
  - (3) whether the Applicant served a valid demand.
12. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

### **(1) Dispensation**

#### **The tribunal's decision**

13. The tribunal granted dispensation in respect of the consultation requirements.

#### **Reasons for the tribunal's decision**

14. It was accepted by the parties that the consultation process was defective because:
  - (a) the notice of intention dated 01/05/2008 did not state the Applicant's reasons for considering it necessary to carry out the major works;
  - (b) the said notice erroneously referred to 'qualifying long term agreement' with a contribution more than £100 and not 'qualifying works' with a contribution more than £250; and
  - (c) the Stage 2 notice dated 29/09/2008 did not summarise the observations received by the Applicant and its response to them.
15. The Respondent's position was that, upon discovering the various defects at a later date, she took the view that the costs were not payable.
16. When considering whether to grant dispensation in relation to the defects, the tribunal followed the Supreme Court decision in the case of *Daejan Investments Ltd -v- Benson and others [2013] UKSC 14*. This

leading authority regarding dispensation requires the tribunal to consider whether the Respondent suffered “*real prejudice*” as a result of the defects outlined above. In considering whether the Respondent suffered prejudice, the question for the tribunal was whether the Respondent would have done something different had the Applicant not made the errors in the consultation process.

17. The Respondent informed the tribunal in her oral evidence that she did not participate in anyway with the consultation process. She also told the tribunal that she would not have done anything different had the errors not been made.
18. It was clear to the tribunal that the defects had not made any material difference to the Respondent. The Respondent had, therefore, not suffered any prejudice at all.
19. Given the above, the tribunal considered that there was no basis upon which to refuse the application for dispensation since the Respondent had not suffered any prejudice.

**(2) Whether the works were necessary and the costs reasonably incurred**

**The tribunal’s decision**

20. The tribunal determined that the works were necessary and that the costs were reasonably incurred.

**Reasons for the tribunal’s decision**

21. The Respondent’s contention appeared to be that the works were unnecessary and the costs had not reasonably been incurred as the consultation process was defective.
22. The lease obliges the Applicant to undertaken cyclical redecoration to exterior and interior areas every 4 years (see clause 3 to the Sixth Schedule). The tribunal heard, however, that this redecoration has only been undertaken in 2008-09. By this time, the works were, in fact, some years behind schedule. The Respondent in her oral evidence took a neutral position as to whether the works were necessary. She certainly did not assert that the decoration was in such a good state that the cyclical works were still not required even if they were so overdue.
23. The property has its own entrance and that Respondent does not access the internal communal areas. The tribunal heard that the Applicant has subsequently agreed to waive the service charges in relation to these areas but this must be regarded as ‘gesture of goodwill’ (or

similar) since the lease has not been varied so as to alter the Respondent's liability.

24. Given that the contractual position is that the cyclical redecoration must be carried out every 4 years, the tribunal considered that the works were necessary and the costs reasonably incurred.

**(3) Whether the demand was valid**

**The tribunal's decision**

25. The tribunal determined that a summary of tenants' rights and obligations had not been included with the letter and invoice served by the Applicant on 18/08/2010.
26. A valid demand was not served until 16/06/2014 when the Applicant served the summary in its bundle for the hearing on 03/07/2014. The Respondent has, therefore, been entitled to withhold payment until 16/06/2014 in accordance with s. 21B(3) of the 1985 Act.
27. The application for payment served on 18/08/2010 amounted to a notification of relevant costs for the purposes of s. 20B(2) of the 1985 Act and, therefore, the notification was within the 18 month time limit.

**Reasons for the tribunal's decision**

28. The Applicant's witness, Ms Everton, had only been in post since 2013. The tribunal heard that Ms Everton had searched various computer records and paper files in order to collate documents for the Applicant's bundle. In doing so, Ms Everton found the letter of 18/08/2010, the invoice for the Respondent's share of the costs of the major and also a summary of tenant's rights and obligations. The Applicant did not hold any records concerning the documents served and no-one is currently employed who was in post at the time.
29. Ms Everton explained that it was the Applicant's standard procedure to serve a summary with a demand. She told the tribunal that her predecessor, Clive Morrison, would have had to print out each document separately and then enclose them in envelopes to be sent to each leaseholder. There were a total of 23 flats that needed to be served. Ms Everton acknowledged that she could not be 100% certain that the summary had been enclosed.
30. The Respondent was adamant that the summary had not been enclosed. She produced evidence of a number of administrative failings on the part of the Applicant, including their mailing service that is now used in the place of the administrative tasks undertaken by Mr

Morrison. The Respondent also submitted witness statements from two neighbours in the block who also claimed that the summary had not been enclosed in the correspondence they had received regarding the major works.

31. The tribunal considered that the Respondent was a credible witness and accepted her evidence that she had not been served with the summary, particularly as the method used by Mr Morrison was capable of error and also given the administrative problems suffered by the Applicant.
32. The summary was served with the Applicant's bundle on 16/06/2014 so a valid demand has now been served. This means that from 16/06/2014 the Respondent is no longer entitled to withhold the service charges.
33. The letter of 18/08/2010 and the invoice enclosed was a clear notification of the relevant costs. The Applicant's bundle included the application for payment in respect of the works. None of these had been incurred prior to 18/02/2009 so it was apparent that the notification was within the 18 month time limit.

### **Costs**

34. At the end of the hearing, the Applicant indicated that it had no intention to seek the costs of the proceedings before the tribunal against the Respondent, including the application fee incurred in respect of the s. 20 application. In view of this and for the avoidance of doubt, the tribunal makes an order under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.
35. The Respondent applied at the end of the hearing for costs against the Applicant, namely legal costs of £900.00 (inc. VAT) and for the cost of bundles of £240.00. The tribunal declined the Respondent's application. The Respondent was largely unsuccessful. The tribunal only found that she was entitled to 'withhold' payment but she was found to be liable for the costs. The tribunal also considered the Respondent's bundle to be largely unnecessary since much of it simply duplicated the bundle submitted by the Applicant.

### **The next steps**

36. The tribunal has no jurisdiction over ground rent or county court costs. This matter should now be returned to the Clerkenwell and Shoreditch County Court.

**Name:** J E Guest

**Date:** 14/07/2014



## **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 that 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.]

### **Section 20B**

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

### **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.

## **Commonhold and Leasehold Reform Act 2002**

### **Schedule 11, paragraph 1**

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
  - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
  - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
  - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
  - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
  - (a) specified in his lease, nor
  - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

### **Schedule 11, paragraph 2**

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

### **Schedule 11, paragraph 5**

- (1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  - (a) in a particular manner, or

(b) on particular evidence,  
of any question which may be the subject matter of an application  
under sub-paragraph (1).