FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
Formerly the Leasehold Valuation Tribunal

Case Reference	:	**LON/00AW/LDC/2016/0140 and LON/00AW/LSC/2016/0014**
Property	:	**9C and 9D Holland Road, London W14 8HJ**
Applicant	:	**Ms C. Norris (also known as Ms Kitty Mason)**
Representative	:	**In person**
Respondents	:	**Mr N. Kullman, Ms G. Kullman (1) Mr M. Miller, Ms C. Miller (2)**
Representative	:	**Ms Elizabeth England of Counsel**
Type of Application	:	**Reasonableness of Service Charges – Section 20ZA Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge Lancelot Robson**
Hearing Date	:	**13th February 2017**
Decision Date		**2nd March 2017**

DECISION

DECISION SUMMARY

The Tribunal decided:

A. to make an order for dispensation from some or all of the requirements of Section 20ZA of the Landlord and Tenant Act 1985 (the Act).

B. that the Applicant shall pay the Respondent's legal costs of £2,260 in connection with this application within 21 days of the date of this decision.

C. to make a Section 20C order under the Act in favour of the Respondents so that none of the Applicant's costs of this application shall considered relevant costs chargeable to the service charge.

D. to refuse to make an Order pursuant to Regulation 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 as requested by the Respondents.

E. to make the other decisions noted below.

BACKGROUND

Preliminary

1. Following a previous decision by the Tribunal dated 20th August 2016 in case no. LON/00AW/LSC/2016/0014 on an application by the Respondents under Section 27A and 20C of the Landlord and Tenant Act 1985 relating to reasonableness of Service Charges, the Applicant applied under Section 20ZA of the Act on 8th December 2016 for dispensation with the notice requirements set out in Section 20 of the Act. This application relates to major works of external repair and redecoration carried out by the Applicant to the Property in or about July 2013. The Applicant contended that while the statutory notices had not been validly given, the Respondent lessees had suffered no real prejudice resulting from the failure to serve the notices. The lessees of two of the three residential properties (the Applicant landlord being also the remaining lessee) opposed the application. Directions were given by the Tribunal on 14th December 2016. The Applicant made a written statement attached to her application, and a written statement on behalf of the Respondents was made dated 26th January 2017, and each party provided a bundle of documents in support of their statements prior to the hearing on 13th February 2017.

Hearing

2. With the agreement of the parties, the Tribunal Judge exercised his jurisdiction pursuant to the Crime and Courts Act 2013 and sat alone on

this application as the nominated professional member of the Tribunal had not arrived within 30 minutes of the time set for the hearing. The Applicant was assisted by a lay representative, Mr Graham. Ms Elizabeth England of Counsel appeared for the Respondents.

3. At the start of the hearing the Tribunal reminded the parties of the effect of the case of Daejan v Benson (No 2) [2013] UKSC 54, (binding upon this Tribunal) where the Supreme Court, by a majority, had decided that the predominant factor to consider when dealing with Section 20ZA applications was whether the landlord's non-compliance with the consultation requirements of Section 20 had caused financial prejudice to the lessees. Mr Graham and Ms England acknowledged that they were aware of the details of that decision. Also as a result of the discussion with the parties, the Tribunal understands that the cost of the major works in dispute was £6,300 plus scaffolding expenses of £2,640. The Respondents had paid their shares (£880 each) of the scaffolding costs, and half of their shares of the major works (£1,050 each). The major works done were detailed to a considerable extent in the invoice of Masterman Maintenance (hereafter Masterman) dated 1st December 2013 (page 121 of the Applicant's bundle). This invoice appeared to have been founded on an estimate from Stevie Masterman for £6,100) attached to an email to the Applicant dated 26th June 2013 (page 72 of the Applicant's bundle). At the hearing the Applicant confirmed that the extra £200 related to power washing done to prepare the building by Masterman prior to the start of the Major Works in dispute, and the Tribunal noted that there was supporting correspondence at page 82 onwards in the bundle which referred to the power washing.

Applicant's case

4. Ms Mason submitted that;

a) the works done had been agreed with the Respondents at a meeting on 9th April 2013.

b) a valid Section 20 notice had in fact been issued in 2011, although when the Tribunal reminded her at the hearing that she had previously admitted that there was no valid Section 20 notice and that this was recorded in the Tribunal's previous decision dated 20th August 2016, she admitted that she had assumed that once such a notice had been served, there was no need to serve a further notice. Also towards the end of the hearing Mr Graham suggested that the Applicant had in fact been attempting to follow the requirements of the Section 20 using a procedure which was now obsolete.

c) extensive consultation had taken place with the Respondents, and that the least expensive contractors had been appointed after all the quotations had been considered by the parties.

d) No relevant prejudice had been suffered by the Respondents by the Applicant's failure to serve another Section 20 notice. They had been

advised of the works prior to purchasing their leases, had been consulted after becoming leaseholders, and had been involved in agreeing the scope of the works as well as the award of the contracts. Also they were in a position to ensure that inappropriate works were not carried out.

e) Generally, the Respondents were not deprived of the opportunity to have a voice and express their views, and there was, it was submitted, supporting evidence in the bundle to prove this submission.

f) The Tribunal was invited to make an unconditional dispensation to the Applicant under Section 20ZA. Granting dispensation on terms was not appropriate as they had been consulted, had not suffered any relevant prejudice, and had a voice throughout the process. Even the scaffolding company had been chosen by the Respondents.

5. In reply to points made by the Respondents, Ms Mason submitted that;

a) the Applicant was satisfied with the quality of the works.

b) The Respondents' legal costs of £2,260 (quoted by Counsel) were disproportionate to the amount claimed. £200 was all they should be awarded.

c) The Respondents wanted Masterman to do the job.

d) The Respondents had never made it clear that they wanted a Section 20 notice. Their preferred contractor had wanted to start the work before the school term ended, as well as being more expensive. Their surveyor and Mr Kullman had inspected the property.

e) She wished to reopen issues in the previous case, stating that certain facts found there were erroneous, and produced a short witness statement to that effect, which she stated had been lodged with the Tribunal on the last working day before the hearing. (The Tribunal notes that it refused to consider this last point or the witness statement, as the matters complained of were agreed at the previous hearing, and no successful appeal had been made relating to these points. Further, the Applicant raised these matters in her closing submissions rather than at the beginning of the hearing. It was by then far too late to raise the point, as neither the Tribunal nor the Respondents were aware of the witness statement until that point).

Respondents' case

6. The Respondents' case can be summarised as follows;

a) The Applicant had failed to maintain the building for many years. A Section 20 consultation had taken place in 2011. This was superseded by emergency works in February 2013 to remedy water penetration into the building. A meeting had been held on 9th April 2013 with the Applicant, after which the Respondents had expected a further Section 20 consultation to be carried out. Only after scaffolding was erected in May

2013 was the true extent of the work known. However the Applicant did not engage at all with the Respondents during June 2013 and simply nominated Masterman to carry out the works. There were no other comparable quotes and the Respondents were told not to engage further with the process.

b) The Respondents suffered prejudice because;

aa) The works in 2013 were a direct result of the Respondent's failure to maintain the building in accordance with the Lease. The Applicants had been deprived of the ability to know whether all or part of the works would have been rechargeable under the service charge, or what the Respondents' contribution would be.

bb) If the process had been properly and fairly carried out (particularly in accordance with the Respondent's contractual obligations in the Lease as a trustee);

i) The Respondents would each have been charged 25% of the agreed qualifying works rather than 33%. The Respondents had queried why the costs were being divided by three, when in fact the building was split into four parts. In December 2013, the Applicant had altered the service charge percentages in the lease of the basement premises in which she ran the nursery school, to reduce its service charge contribution to 1%, and also had not accounted for the overpayments to the service charge contribution in prior years.

ii) The works would have been fairly apportioned to take into account the additional expense caused by lack of maintenance. On 12th January 2013, the Applicant had admitted that the lack of maintenance had doubled the cost of the repairs. The extent of the repairs were confirmed by a builder who visited on or around 17th January 2013. Further, the works for which dispensation was sought were not set out in the minutes of the meeting of 9th April 2013, as submitted by the Applicant. It remained unclear where that list was set out. The works actually carried out in the period June – September 2013 were set out in the service charge expenditure for the year ending 31st December 2013 and included; protective netting; exterior repairs and painting; Hire and erection of scaffolding. These were all necessitated by the damage done to the building by water penetration, caused by the lack of maintenance by the Applicant over many years.

iii) The Respondents would have had the opportunity to obtain their own surveyor's report if the extent of the work had not been agreed.

iv) The Respondents would have been able to obtain comparable quotes from their preferred contractors. In May 2013 the parties were still not entirely sure what works were required. They decided to erect scaffolding to obtain a better perspective. The Respondents made these arrangements. On 11th June the Respondents attempted to consult with the Applicant at a (proposed) meeting. The Applicant's response was that

the works were already under way. This caused a breakdown in the relationship. Towards the end of June the Respondents began to liaise with Masterman as they were unable to obtain any response from the Applicant, and as a result Masterman produced a revised quote for £6,100. The Respondents advised the Applicant on 4th July 2013 that they wished to obtain a revised quote from their preferred contractor Pal Szampfor. The Applicant responded on 5th July 2013 that they should not make any further arrangements. Masterman stated on 31st July that certain works had been completed on 30th July 2013. The Masterman invoice of 1st December 2013 referred to repairs, making good and protecting the building, which pointed to the works being in rectification of the flood damage, which had occurred due to the Applicant's breach of the repairing covenant.

c) The severe delay in making the Section 20ZA application meant that the Respondents were not in a position to present evidence as to what they would have done differently if the Applicant had complied with the full statutory consultation process. They were severely prejudiced by not being able to obtain evidence to demonstrate either the actual extent of the required works or obtain comparable quotes.

d) The Applicant was dealing with the Respondents unfairly more generally, as evidenced by the Tribunal's decision of 20th August 2016. The Tribunal should determine whether it was reasonable in all the circumstances to grant dispensation.

e) Generally, the Respondents opposed a grant of dispensation, but if the Tribunal was minded to grant one, it should determine how much of the cost was caused by the Applicant's failure to maintain the building, and how much the Respondents [in fact the service charge] would be liable for. Ms England suggested that the figure sought should be reduced by 50%. Also it should determine that the Applicant, as a trustee, should not have preferred one leaseholder over another and thus determine that the Respondents should pay only 25% of the cost of the service charge. The Tribunal should determine that the Applicant should pay the Respondents' costs in any event, or make a Rule 13 order against the Applicant for unreasonable behaviour. The Respondents also sought a Section 20C order [i.e. to prevent the Applicant charging the costs of this application to the service charge].

Decision

7. The Tribunal considered the evidence and submissions. When considering the Applicant's case it noted that;

a) Relating to para. 4a), The Applicant overstated the case by stating that the specification had been agreed at the meeting on 9th April 2013. It was clear from the correspondence between the parties that there were many issues still outstanding, and the Applicant herself, when writing to Mr Kullman on 9th April had a query on the items the window quotation would cover, and Mr Kullman raised other items in his email of 11th

April. While an agenda for the meeting was in the bundle, Mr Miller's notes of the meeting were not in the Applicant's bundle. Some items might well have been agreed, but it was clear from the correspondence taken as a whole that both sides considered there were outstanding items.

4b) and 5e) – despite the Applicant's strongly held view that a valid Section 20 notice had been served, it was clear from the documents she relied upon, as well as her previous admissions, that her view was not correct.

4c) – there had been extensive consultation with the Respondents, but a number of important items had been omitted from this consultation. Without an agreed specification, there was little chance of other contractors producing a properly comparable quotation, particularly when it was primarily the Respondents who were seeking an increased specification. The Applicant gave out little information during June, and it appeared to be common ground that Masterman had inspected the property with some of the Respondents, and produced a more expensive quote (although still considerably cheaper than the other quotes) as a direct result.

4d) - again this appeared to overstate the case, as the Applicant suggested that the Respondents were able to ensure that no inappropriate works were carried out. However the Respondents' consistent position was that more works were in fact needed.

4e) - see above

4f) - This submission did not take into account the decision of Daejan v Benson. In the Supreme Court decision, it was clear that at least the respondents' reasonable legal expenses in testing the evidence should normally be paid by the successful applicant for a Section 20ZA dispensation. This was in fact the one item where the Tribunal had specific financial evidence from Ms England as to her fee.

8. Dealing with paragraph 5 above,

5a) - the Tribunal noted the Applicant's view, and also that the Respondents, despite their strong assertions, provided no specific evidence to the contrary.

5b) The Applicant gave no reason for suggesting that the Respondents' legal costs of £2,260 were disproportionate to the amount claimed. As the Tribunal noted at the start of the hearing, the cost of the works in issue was £8,940. Without a dispensation, the Respondents would only be obliged to pay £250 each. No reason was given for the suggestion that £200 was an adequate order, and in any event it was a quite unrealistic amount.

5c) - the correspondence did not suggest that the Respondents wanted Masterman to do the job, rather that they made the best of what amounted to a fait accompli on the part of the Applicant

5d) - again the correspondence showed that this seemed to be wishful thinking on the part of the Applicant. The inspection point seemed not only inaccurate, but irrelevant to the question of whether the Respondents had given notice that they required a Section 20 procedure. Further, there was no provision in the Act for parties to contract out of the statutory obligation.

5e) - dealt with above.

9. Turning to the Respondents' case;

a) The Tribunal is well aware of the background, which was dealt with at some length in the decision dated 20th August 2016. However, as the Supreme Court in Daejan v Benson (see above) made clear, the jurisdiction granted by Section 20ZA is not intended to be used as a penal provision where the consultation procedure has not been followed. The primary issue is whether the Respondent leaseholders suffered financial prejudice. In essence the first limb of the Respondents' submissions was that no dispensation should be granted at all, and that dispensation on terms was inadequate in the circumstances, due to the Applicant's previous behaviour. The Tribunal considered that there were two major difficulties with that approach; firstly, the Tribunal made certain decisions on 20th August 2016 reducing the service charges demanded, and made certain other decisions on costs in the Respondents' favour, as a result of the Applicant's behaviour and lack of competence. To revisit that issue might well result in an element of double penalty. Secondly, this submission appears to go well beyond the financial prejudice considered appropriate by the Court in Daejan v Benson.

b) (aa) The Respondents' submissions on this point also seemed to be overstating the case. Neither party has produced in evidence a surveyor's report. In essence the Respondents are putting forward a case of historic neglect. However without a comprehensive surveyor's report, and/or an expert witness's report such a case would almost certainly fail. Further, such a submission seems only appropriate in a substantive Section 27A application where full details of the defects and problems are given. In this Tribunal's view, a Section 20ZA application is not the place to argue such an issue. However the Tribunal's previous decision does not preclude either party from making a further application relating to the reasonableness of the Major Works concerned. That decision dealt only with the validity of the demands so far made.

b)(bb) (i) Again the Respondents' case seemed overstated. In the decision of 20th August 2016, the Tribunal took the view that the service charge percentages in the original leases could not be amended without a successful Section 35 application to vary the leases. The Respondents withdrew an application in 2014 on this point. The Tribunal reiterates its view that the breach of trust point seems more appropriate for a specific

application and argument in the County Court. Again this issue seems inappropriate for decision on a Section 20ZA application.

b) (bb)(ii) See the comments at para.8b)(aa) above. Also the Tribunal considered that the alleged admission on 12th January 2013 in fact was a comment relating to the emergency works to deal with water damage to the first floor rear flat roof, which are not the subject of this application. The Tribunal accepts (see para 5??b above) that there was no clear specification, until Mastermans billed the work in December 2013. However the lack of such a specification is not fatal to an application under Section 20ZA, which is intended to give relief to landlords where the consultation procedure under Section 20 has been omitted, or is defective for some reason. While a landlord's conduct might, in appropriate circumstances, affect the Tribunal's view on exercising its discretion, the decision in Daejan v Benson suggests that the conduct would have to be well out of the ordinary.

b)(bb)(iii)and (iv) See the Tribunal's comments immediately above.

c) The Tribunal considered that the delay in making the Section 20ZA application has not prevented the Respondents from collecting evidence which would protect their position. Indeed, the lapse of time since the works were completed should allow a more accurate assessment of the quality of the repair work done, which was one of their complaints. At the hearing, the Respondents agreed that the redecoration work was not in issue, although they had concerns in case the redecoration had been applied over unsatisfactory repair work. Since the external decorative cycle recommenced in 2013, a periodic inspection will be due soon. A competent surveyor would be expected to pick up any unsatisfactory repairs at that point.

d) The question of unfair treatment of the Respondents generally has been addressed above at para. 8(a) above. This issue seems not to be a significant consideration in determining a Section 20ZA application, see Daejan v Benson above.

e) The Tribunal considered that the Respondents' arguments against granting dispensation were not substantiated, particularly in view of the Daejan v Benson decision. However the Tribunal accepted that if it made a dispensation was made on terms, those terms should normally include the payment of the Respondents' legal costs in respect of the Section 20ZA application. The Respondents also sought a Section 20C order [i.e. to prevent the Applicant charging its costs of this application to the service charge]. That also seemed a reasonable submission in the circumstances. However the Tribunal considered that the request for an order under Regulation 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 for unreasonable behaviour by the Applicant seemed unsupported by the evidence. Also there was no

detailed evidence of actual loss occasioned by the alleged conduct put before the Tribunal. The Respondents will have their legal costs of £2,260 for this application in any event. Also an order under Regulation 13(2) seemed inappropriate

10. Thus the Tribunal decided that it should grant the application for dispensation such dispensation to be conditional upon the Applicant paying the Respondents' costs of £2,260 in respect of the application.

11. The Tribunal also granted the Section 20C order as requested by the Respondents so that none of the Applicant's costs of this application shall be considered "relevant costs" (and thus cannot be charged to the service charge).

Tribunal Judge: Lancelot Robson 2 March 2017

Appendix

Landlord & Tenant Act 1985

Section 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 qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

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

The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013

Regulations 13(1) - (3)

13.-(1) The Tribunal may make an order in respect of costs only-

(a) under Section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending, or conducting proceedings in-

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on application or on its own initiative.
