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Residential Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 SECTIONs 27A and 20ZA

Flat 10 John Day House, Lower Square, Isleworth, Middx TW7 6XH

Ref: LON/00AT/LSC/2009/0631

Mrs Harriet Cameron-Clarke — **Applicant**

Thames Reach Management Company Limited — **Respondents**

Dates of hearing:	8 April & 10 June 2010
Tribunal:	Mr M Martynski (Solicitor) Mr C Kane FRICS Mr L G Packer
Appearances:	Mrs Cameron-Clarke Dr Critchlow (speaking for the Applicant) Mr Miers (leaseholder for the Respondent) Mr Botha (leaseholder for the Respondent) Mrs Wyatt (leaseholder for the Respondent)

DECISION

Decision summary

1. The Tribunal finds the sum of £60,016.93 spent on roof works in 2009/10 to be reasonably incurred.

2. The Tribunal finds no evidence to suggest that the Applicant's share of this cost is not payable on an argument that the work could have been done at a lesser cost if done earlier.

3. The Tribunal declines to consider the Applicant's claim for compensation in respect of the leaking from the roof into her flat insofar as that may impact on the payability of the charge in respect of 2009/10 major roof works. The Tribunal concludes that it has not been provided with the evidence properly to deal with the claim and suggests that County Court proceedings are more suited to deal with disputes of this kind.

4. The sums challenged in respect of insurance for the year 2004/05, erection of TV aerial, repair of front door and miscellaneous exterior (non-roof) works in 2008 were reasonably incurred and are payable.

5. The requirements of section 20 Landlord and Tenant Act 1985 as to consultation were not met by the Respondent in relation to the roof works carried out in 2008. The Tribunal refuses the Respondent's application for dispensation from the requirements of section 20. Accordingly, the sums payable by the Applicant in relation to the roof works carried out in 2008 are limited to £250.00 in respect of each set of works (total £500.00 for those works).

6. The Tribunal, in this application, has no power to amend the service charge percentages laid down it.

7. Certified service charge accounts have not been produced in accordance with the sixth schedule of the lease.

8. There is power for the creation of a reserve fund. Credits from service charge payments cannot however be transferred to that fund.

Background

9. The building in question ('the Building') consists of a Grade 2 listed building with 1970's buildings attached either side. The Building comprises 20 flats.

10. The Respondent (which is a party to every lease) was set up at the time the Building was converted to residential flats by the former freeholder. At that time it was granted a lease of the Building for 125 years. It is now the freehold owner of the Building. The freehold was transferred to it on 1 June 2004.

11. In the leases for the various flats in the Building, each leaseholder agrees to become a member of the Respondent company. The leaseholders are therefore effectively their own landlords. It would appear that at the outset, there were 25 shareholders. Five shares belonged to nominees of the freeholder. The Respondent's Articles provided that the 20 leaseholder members were not to have any voting rights until after the last flat lease was sold. After that time, the five nominees resigned and the leaseholders could properly run the Respondent company (the first leaseholder directors were appointed in July 2005).

12. This application raises a number of questions regarding different aspects of the service charge for the Building.

The issues and the Tribunal's decisions

Roof

13. There has been a long history of problems with parts of the roof at the Building starting in or about 2002. The roof problems have only recently been resolved with major works being carried out at a total cost of £63,000.

14. An offer has been made, pursuant to the NHBC agreement that was issued to each leaseholder when the Building was converted, in settlement in respect of the problems with the roof in the sum of £19,072. It would appear from the evidence shown to the Tribunal that this offer has been made to the leaseholders rather than the Respondent and that the settlement money is theirs rather than the Respondent's.

15. The issues raised by the Applicant regarding the roof are; First, because there has been delay in attending to the roof, the costs of the work to the roof are now much higher than they would have been had roof works been carried out earlier.

16. Second, the Applicant says that, as a result of a failure to repair the roof, she has suffered numerous incidents of water ingress into her flat (making her flat unpleasant, causing distress to herself and her ((unwell)) husband ((now deceased)) and causing damage, including damage to the decorations) and that she should be compensated for this.

17. Third, the Applicant is of the view that prior to the transfer of the freehold to the Respondent, it should have obtained a guarantee or warranty regarding the roof, thus avoiding some or all of the current expense.

18. It is necessary to set out, in brief, some of the history of the troubled roof. In late December 2002, the Applicant's flat (which sits partly under the roof of the listed building and partly under the roof of the newer building) suffered water penetration from the roof of the listed building into her hallway. Later in 2003 she started to experience water leaking from the roof of the newer building into her kitchen. These leaks were reported to the managing agents. She continued to give notice of the problem into 2003. In July that year, the developers, Bovis (who had carried out the conversion of the Building into flats), suggested a meeting with the managing agents to try and work out why the roof was leaking. That offer appears never to have been taken up.

19. In August 2003, Ms Wyatt, a leaseholder on the then residents' committee, prepared a briefing document for solicitors dealing with the proposed transfer of freehold in which she made mention of the problems with the roof and the fact that the residents wanted some form of warranty or indemnity to the effect that the transfer of the freehold did not transfer the obligation to deal with the problems with the roof. She mentioned the fact that the Building had the benefit of an NHBC agreement.

20. In March 2004, the Respondent's managing agents commissioned HBSV chartered surveyors to investigate the roof problems. HBSV referred to the reports of leaking from various flats. They considered that the roof covering had been correctly installed but concluded that this covering had been breached, hence the leaks. They suggested an electrolysis test be undertaking. From the literature they supplied with their letter, it appears that this test would be undertaken whilst the roof was dry.

21. The roof issues were discussed at the Respondent's AGM on 1 September 2004. It was concluded that, as there had not been any reports of recent leaks, the directors did not see the need for further works at that stage. The Applicant says that she voiced concerns at this meeting but those concerns were not minuted.

22. Just one month later, in October 2004, HBSV reported on further leaks. They again recommend Electrolysis testing and this was auctioned. However according to the Applicant, the contractors who turned up to carry out the test said they wanted to flood the roof. The Applicant and her husband were unwilling to allow any such flooding until such time as they were given an indemnity for any damage caused to their flat by the flooding. The managing agents replied in a letter of 8 November 2004 that the roofing contractor were not able to give an undertaking and that 'we are therefore in a stale mate situation'.

23. The Applicant and her husband were now so concerned that they and four other leaseholders called an Extraordinary General Meeting of the Respondent company in December 2004. At that meeting it was resolved that Mr Miers would take the lead on the roof issue to try and get it resolved with assistance from the Applicant's husband and one other. As it turned out, for reasons that are disputed, the Applicant's husband was not involved in the further investigation.

24. In 2004-05, following consultation between Mr Miers and the managing agents, some works were undertaken on the roof whereby pipes were laid in order to assist drainage and hopefully stop water settling and penetrating. The minutes of the Respondent's AGM of March 2005 report that the roof had continued to be a 'major problem' for the Applicant's flat. The minutes went on to record that there had been no significant heavy rainfall over the winter; that as in previous years the leaks had been extremely erratic; and that the situation must continue to be monitored. But the minutes also record that 'Mr and Mrs Cameron-Clark remained dissatisfied regarding the roof.

25. The Applicant states that her flat continued to suffer from water penetration and in an effort to move things along, she became a Director at the Respondent's AGM held in October 2006.

26. In 2007 a Surveyor, Mr Hugh Marshall BSc FRICS, was commissioned to report on the roof. The applicant told the Tribunal that Mr Marshall's name had been put forward by her. In his report dated 18 May 2007 Mr Marshall referred to various issues, including shallow falls and inadequate rainwater disposal which led to water ponding on the roof. He recommended various works.

27. In February/March 2008, some roof works were carried out to the roof covering the newer building including an area over the Applicant's kitchen. That work stopped the water ingress into the kitchen.

28. In April 2008 there was a further consideration of the roof issues and a report produced by Mr Marshall. Various further works were recommended. In addition, Mr Marshall reported that:-

> .....it was found that the design and previous work carried out did not meet the manufacturer's recommendations. Efforts to establish redress have been unsatisfactory with no admissions of liability.

Mr Marshall further recommended that:-

> The manufacturer should be pursued in view of the supervision that has allowed the previous roof to be incorrectly installed.

29. Mr Marshall also commented, in a letter of April 2008 to Messrs Snellers, that;

> Firstly, I must apologise for my delay in getting to grips with this matter since we finished the initial work

28. Various investigations were then made to see if anyone could be pursued and found liable for the roof issues. This included a meeting with solicitors with a view to instructing them to investigate legal action to recover the costs of the works to the roof. Given the likely costs of legal action and the uncertainty of such action producing results, it was decided that the money would be better spent on carrying out the works to the roof.

30. In early 2009, Mr Marshall conducted a tender exercise for major works to the roof. The tenders received (which did not include VAT or professional fees) ranged from £30,520 to £85,567. Mr Marshall concluded that the tender process was not valid given the wide disparity in the quotes received. It should be noted at this point that the Respondent alleges that Mr Marshall delayed by several months in putting a specification together leading to the tender process. Mr Marshall resigned from the project after the failed tender process.

31. New surveyors, Richard Neale Associates, were appointed who reported and carried out a further tender process. Major works were finally carried out to the roof between late 2009 and March 2010. Those works included some of the measures suggested by Mr Marshall but also some different measures. For example the falls were left unaltered.

The Applicant's objections to the cost of the major roof works 2009-10

32. The Tribunal rejects the Applicant's complaint that the money spent on the roof for the major works was not reasonably incurred because some sort of indemnity or warranty should have been obtained. First, the Respondent company has always been the head lessor of the occupants of the Building and has always been liable for the maintenance of the structure, including the roof. If therefore the original developer and freeholder never had any responsibility to maintain the roof, it is difficult to see therefore what warranty or indemnity could have been obtained upon the transfer of the freehold to the Respondent.

33. In any event, even if something could have been obtained, no evidence was given to the Tribunal that anything better than the NHBC settlement of some £19,000 that has now been obtained could have been achieved at the time.

34. As to an argument that the roof works are more expensive now than they would have been had the works been done earlier, the Applicant provided no evidence to support this claim, nor was any evidence provided as to the extra items of work that needed doing as a result of the passage of time or as to the exact or even general amount of the additional cost incurred.

35. Finally on this issue, there is the question of the Applicant's potential claim for compensation in respect of the water ingress that she has suffered over the years. At the

outset of the hearing, the Tribunal indicated to the parties that, when considering payability of the cost of the recent works carried out to the roof, it had the jurisdiction to consider and assess a claim for compensation to set off any claim for service charge for those roof works[1]. The Applicant was aware that there was the possibility of such a claim being heard by the Tribunal, the Respondent was completely unaware of it.

36. The Tribunal has no doubt that over the years the Applicant has suffered major inconvenience and distress as a result of the water ingress into her and her late husband's flat. It is also satisfied that the directors have worked hard (without payment) on the largely thankless task of trying to resolve a problem with the roof which by its nature can often be difficult to diagnose. Time passed at various stages for various reasons (including a delay admitted by the consultant Mr Marshall who had been appointed on the Applicant's suggestion). Overall however, the Tribunal is of the view that the Respondent, corporately speaking (the Tribunal does not blame any individual), took an unreasonable amount of time to finally resolve the problem with the roof and this was to the detriment of the Applicant.

37. This however is separate from the question of whether the Applicant has a valid claim to seek compensation for the damage and distress caused by the leakage. The Tribunal notes the Applicant's claim but declines to consider it. During the course of the hearing it became apparent that the history of the roof and its defects raised highly complex technical building and legal issues. The Tribunal concludes that it was not provided with sufficient expert evidence properly to address the questions raised, nor were the parties equipped to argue the legal issues before the Tribunal. The Tribunal is particularly concerned that there is a fundamental issue as to whether the problems that the Applicant has suffered are due to design defects or to disrepair. If it is the former, the Applicant may not, in law, have a claim against the Respondent. These issues, if they are to be adjudicated upon, should be heard in the County Court where the process (including precise points of claim and defence and the full regulation of expert evidence) is far more suited to a dispute of this nature.

Insurance – 2004/05 - £16,750

38. Under the terms of the Applicant's lease, the Respondent had to insure the Building via a broker and insurer approved by the former freeholder.

39. The insurance for 2002 was approximately £4892.00, for 2003 it was £10,098 and for the year in question it was approximately £16,750.

40. The insurance for the year in question was placed in April 2004. This was of course at a time when the freehold was still owned by the development company and at a time when none of the leaseholders were directors of the Respondent company (the first leaseholder directors were not appointed until July 2004).

41. It is the Applicant's case that the insurance premium for the Building for this year was unnecessarily high mainly because it was based on a re-building cost that was far too high. In addition, she argued that the Respondent should have taken more robust steps to challenge the insurance arranged and should have taken steps to cancel that insurance upon the transfer of the freehold and then to arrange cheaper insurance.

[1] Continental Property Ventures Inc v White and another [2006] 1 EGLR 85

42. The Applicant obtained an alternative professional opinion on the re-building cost of £4.765 million as opposed to the re-building cost of £7.5 million upon which the insurance premium in question was obtained. Based on this alternative re-building cost, the Applicant obtained an alternative quote for the insurance of £5,462 with terrorism cover for a further £391. The Applicant told the Tribunal that the insurance company providing the alternative quote was given the insurance history of the building so far as it was known to herself and her husband.

43. For the Respondent, as to the re-building costs, it was stated that there was a difference of opinion as to how these should be calculated. The Respondent's directors present at the hearing stated that they spent some considerable time considering conflicting advice as to the correct way to calculate re-building costs. They went back to the valuers who produced the valuation of £7.5 million, those valuers were told of the alternative valuation but stood by their valuation commenting:-

> Without wishing to be impertinent, you kindly placed your instructions with my company and I feel that the Reinstatement Costs Assessment prepared by this office to be a fair reflection of the costs likely to be faced should destruction occur.

44. The Respondent's directors gave evidence that, so far as they were aware, one reason for the very high premium for this year was an ongoing insurance claim in respect of flat 1 that was in the region of £90,000.

45. There were, according to these directors, three main reasons why it was not practicable to cancel the insurance when they took over in July 2004 and to obtain cheaper insurance at that time. First, the claim in respect of flat 1 was not fully resolved until later in 2004 or early 2005, and that until that claim was resolved, it was not going to be feasible to obtain alternative insurance. Second, the directors said that they were advised that no saving would be made by the cancellation of the insurance policy mid-way through its term. The amount of premium that would be refunded would not make the exercise worthwhile. Third, as stated above, a great deal of work was being done in trying to get accurate advice on the correct method of valuation for insurance purposes.

46. The Directors went on to say that the buildings valuation was not the only factor in them obtaining significantly cheaper insurance in 2005. First of all, by that time the very large insurance claim from flat 1 had been resolved. Second, Norwich Union re-entered this section of the insurance market making it very much more competitive.

47. The Tribunal considers that it does not have sufficient evidence to show that the insurance premium in question was unreasonable in amount, or was unreasonably incurred insofar as it was not cancelled sooner. The evidence as to the valuation issue is far from conclusive. Whilst the Applicant produced evidence of an alternative figure for re-building costs, there was nothing to indicate that this was more reliable that the evidence for the higher figure, there being a difference of professional opinion as to the correct method of calculating the re-building cost.

48. It is true that the Respondent management company could have influenced the policy and premium by making representations to the then freeholder regardless of who the directors were. This would however only be relevant if the Tribunal concluded that the premium was

unreasonable. The Tribunal accepts the Respondent's reasons as to why it was not a realistic option to cancel the insurance during its term.

T.V. Aerial – 2005 - £275.00

49. The Applicant objected to the cost of the work done to this aerial because, after it was put up, by order of the local authority, it had to be taken down and re-sited as it did not have planning permission. Further, she maintained that the lease prevents the installation of any such aerial.

50. The Respondent's representatives confirmed that the cost was simply the cost for the erection of the aerial. There were no additional costs charged to the service charge account for having to move it.

51. The Tribunal finds that the cost of £275.00 for the erection of an aerial to a building of this kind is reasonable. As to any previous aerial that had been on the building, the Tribunal heard from Mr Botha that he had not been able to get a proper t.v. reception without the erection of the new aerial.

52. The Tribunal finds that there is power both to erect and charge for an aerial within the lease [see paragraph 7 of the fifth schedule and the provisions of the sixth schedule]

Repair to front door - 2007 – £705.00

53. The Applicant maintained that the front door was damaged by the sub-tenant of flat 9. Accordingly, the damage caused by that sub-tenant should be paid for by the tenant of flat 9 rather than the service charge.

54. There was circumstantial evidence that the sub-tenant in question may have caused the damage but no direct evidence. No-one was actually seen damaging the door. In the circumstances the costs associated with the damaged door are properly chargeable to the service charge and so payable by the Applicant.

Works March to June 2008 – (various painting and patio works, total value £3080)

55. These were miscellaneous works to the exterior of the Building. At the hearing the Applicant offered no direct evidence to support a challenge as to the reasonableness of the work and the cost of it (nor an allegation that the work had not been commissioned properly) except in relation to an issue with the railings to a bin store area. Those railings had been repainted at a cost of £450. The Applicant produced photographs showing some parts of those railings with chipped paintwork. The Applicant contended that this showed that the work had not been carried out reasonably and that the railings had not been properly primed.

56. The Tribunal was unable to conclude from the photographs that the work in question was not carried out properly. The photographs were consistent with chipped paintwork on railings caused by bins or rubbish banging against the railings which was inevitable in a bin store area.

57. The Applicant also raised an issue that there had not been the required statutory consultation in respect of these items. The Tribunal pointed out to the Applicant that, given the amounts involved, no statutory consultation was required.

Roof repairs in 2008 – Professional fees of £1798.55 and works costs of £5880.87 (March) and £8507 (May); and the application (pursuant to section 20ZA) to dispense with the requirement to consult

58. There were two sets of work. Each set of work concerned a different part of the roof (one to the roof over the old part of the building, one to the roof over the new part) and involved different types of work. The works were done at different times. The work was overseen by a surveyor and there were professional fees for each job (possibly charged in one lump sum).

59. The Tribunal concludes that these works are separate works for the purpose of the statutory consultation obligations placed on the Respondent. The works were, as described above, different in nature and done at different times. The fact that both works attracted professional fees charged in one sum is not sufficient in itself to cause the Tribunal to depart from that view.

60. The Applicant's objection in respect of these items was that there had been no statutory consultation and as a result her contributions to these works were limited. There was no issue between the parties that there had been no consultation complying with section 20 Landlord and Tenant Act 1985 and the regulations made under that section[2].

61. The Respondent argued first that, because the work was paid for out of reserves, no consultation was necessary. This is plainly wrong. It was then argued that the works or at least part of them were paid for, not out of service funds, but out of ground rents collected by the Respondent, accordingly, as service charge funds were not being used, there was no requirement to consult. That argument fails because the Respondent is not able to show that the works were paid for out of rents as opposed to service charge monies. It was further argued that the professional fees should not form part of the costs subject to consultation requirements because those fees did not come within the description 'works' set out in section 20. Again, the Tribunal rejects this argument. The costs of the works inextricably included the professional fees that were incurred directly in connection with them.

62. The Tribunal concludes that the Respondent was required to comply with the statutory consultation regulations regarding the works and failed to do so.

63. The penalty for a failure to consult is that the leaseholders' contributions to the costs of those works is limited to a set amount. This penalty applies unless the Tribunal grants the Respondent dispensation[3] from the consultation requirements.

64. During the course of the hearing the Respondent made an application for dispensation. That application was, after the hearing, served on all leaseholders who were invited to comment. That specific application was dealt with by the Tribunal on the papers alone (there being no objection to this from any leaseholder). Of the 20 flats in the buildings, there were comments from 11 flats. Of those 11, nine were in favour of the application and only Mrs Cameron-Clarke objected to the application. A letter was sent by the leaseholder of

[2] The relevant law is set out at the end of this decision

[3] The relevant law is set out at the end of this decision

flat 2, Mrs Bide-Thomas, but it was not clear from that letter whether the leaseholder was in favour of the application.

65. It was said on the Respondent's behalf that there was no time to consult on the works given that they had to be carried out urgently. The Applicant had been complaining about the leak into her flat for a considerable amount of time. Further, there was consultation in respect of the roof works in that the matter was discussed at a meeting on 10 October 2007. There was then a question and answer leaflet sent out in respect of the works in January 2008. Further to this, the Applicant had plenty of opportunity to comment on the works or to find out details about them particularly given that she was a director of the Respondent at the time. The point was made that the surveyor overseeing the works was a personal friend of the Applicant and he had stated in writing to the Applicant that he had only continued working with the building because he was her friend. Accordingly, the Applicant had unique access to the person overseeing the works and could obtain details about them.

66. Finally the Respondent argued that the value of the works was reduced given that there has been a subsequent settlement pursuant to the NHBC agreement whereby leaseholders have been offered a settlement in respect of the problems with the roof in the sum of £953.60 per leaseholder. The document making the offer states that the offer is in relation to repairs to parapets/upstands. Further, the NHBC settlement accrues to the leaseholders, not the freeholder.

67. As to the Applicant, she stated that she felt that she had been deprived of the opportunity to properly consider their proposed works prior to them being carried out. She felt marginalised as a director and was not getting any details of the work via her directorship. She could not say whether she would have definitely commented on the works or if she would have nominated alternative contractors had she been given notice of the works.

68. Whilst prejudice is a relevant factor in applications of this nature, the Applicant does not have to prove actual or definitive prejudice in order to successfully oppose the Respondent's application. It is up to the Tribunal to consider all the circumstances of the case and to conclude from those circumstances whether or not it is reasonable to grant dispensation.

69. A relevant statement of the law is to be found in the decision of London Borough of Camden and The Leaseholders of 37 flats at 30-40 Grafton Way[4] which was a case where there had been some consultation but there were defects in the way that the consultation was carried out. In that case it was stated as follows:-

> The principal consideration for the purpose of any decision on retrospective dispensation must....be whether any significant prejudice has been suffered by a tenant as a consequence of the landlord's failure to comply with the requirement or requirements in question.
>
> What the leaseholders were not provided with [in this case] was the basic information about the tenders, the opportunity to inspect the tenders and the opportunity to make observations on them, with the council being obliged to take those observations into

[4] Lands Tribunal - LRX/185/2008

account and publish them later together with their response to them. The extent to which, had they been told of the estimates, the leaseholders would have wished to examine them and make observations upon them, can only be a matter of speculation. The fact is that they did not have the opportunity and this amounted to significant prejudice.

70. The Tribunal does not consider that it is reasonable to grant dispensation in this case for the following reasons; First, the Tribunal rejects the Respondent's contention that the works had to be done urgently and that there was no time to consult. As pointed out above, the issues concerning the roof had been outstanding for a considerable time and there had been delay on the Respondent's part in dealing with them. Further, more than sufficient time passed between the discussion of these actual works and their carrying out to allow for a proper consultation process to have taken place.

71. Second, there is no doubt that given the Applicant's long history of involvement and her strong feelings about various issues connected with the building and in particular her personal problems with the roof, she had a close interest in the proposals to carry out works to the roof. The Tribunal cannot speculate on what she may have done if she had been duly consulted about the works, it can however say with confidence that in these circumstances, the failure to consult her was material and was, objectively speaking, prejudicial to her.

72. Third, the Tribunal does not consider that the lack of formal consultation can be waived given the Applicant's position as director. By this time it would appear that relationships between the parties were poor and that, rightly or wrongly, the Applicant felt marginalised from proceedings conducted by the directors. It was common ground that by this stage she was taking little part in the running of the Respondent company. As to the Applicant's relationship with the Surveyor overseeing the work, it seems to the Tribunal that the Applicant would be perfectly entitled to insist that her contact with that Surveyor was professional only and that his duty was to the Respondent, not to her as an individual. The Applicant said that she derived no special or additional knowledge about the works from her position as a director or as a result of her friendship with the Surveyor and the Tribunal has to accept that.

73. Fourth, the Tribunal does not consider that the informal consultation regarding the works was sufficient to replace the statutory consultation requirements. That informal consultation consisted of;

(a) An oral report given by a leaseholder at the Respondent company's AGM on 10 October 2007. That report could in no way replace formal consultation. It gave only scant details of the work to be carried out. As far as can be gleaned from the minutes of the meeting, the proposed work at that stage only involved work to one part of the roof. Of course only those who were at the meeting would have had the benefit of this report. The report gave no details of the costs of the work. No details appeared to have been given to leaseholders as to how they could further comment on the works nor as to an opportunity to nominate contractors.
(b) A leaflet distributed in January 2008. This is simply a leaflet that states that roof works are to begin. The leaflet gives very brief details of some of the work that was actually carried out and contains no invitation to comment on those works, nor did it include any invitation to suggest contractors such as is provided through the statutory consultation process.

74. Fifth, as to the NHBC settlement, this has not yet been finalised and comes some two years after the works in question. The settlement relates to personal claims made by leaseholders and any money from that settlement is due to them as individuals, not to the Respondent. It is in any event not clear to what extent (if any) that settlement relates to the 2008 works as opposed the major roof works carried out recently in 2009/10.

75. Sixth, the Tribunal further notes that, given the non-compliance with the statutory consultation procedure, the Tribunal had no details as to any tender process carried out by the Surveyor and cannot be sure if a proper tender process was carried out so that leaseholders got best value for money.

76. Finally, the Tribunal notes that although no other leaseholder has taken the opportunity to object to the Respondent's application for dispensation and although there were written notifications of support from 8 leaseholders (one of those leaseholders owns two flats), that still left a significant number of leaseholders (ten) from whom there was no comment. The Tribunal concludes that the response does not affect its decision. The support for dispensation from some other leaseholders, in the Tribunal's opinion, does not overcome the prejudice occasioned to Mrs Cameron-Clarke by the admitted failure to go though the Section 20 consultation.

77. The Applicant's contribution to the works is therefore set at £250.00. Given the Tribunal's finding that the works were two separate pieces of work, the total of the Applicant's payable contribution is £250 for each of the works amounting to £500 in total. Therefore of the total costs for the 2008 roof works of £15,488, the Applicant's share (which would normally be 6.41% - £1038) is limited to £500.00.

Service charge percentages

78. The percentages payable are laid down in the lease. The Applicant argued that those percentages should now be adjusted to accord with changes that had taken place over the years.

79. The percentages payable by all 20 flats do not add up to 100%. This is due to a mistake having been made in the percentage set for flat 18 which is paying less than it should. This has now been addressed, flat 18 has agreed to a higher percentage payment.

80. The Tribunal has no power to alter the percentages payable in the lease in this application and in circumstances where those percentages amount to 100% (which they will do when the percentage for flat 18 is changed).

Service charge demands since 2004

81. No dedicated service charge accounts are produced by the Respondent. It relies on its own company accounts (which are made up for each calendar year) and the individual running account statements that it compiles and sends out to lessees.

82. The lease (at clause 5 of the Sixth Schedule) requires the Respondent, as soon as practicable, after 24 June each year, to calculate the amount of the service charge for the preceding 12 months and the sums in the reserve fund and then calculate the amount due from or standing to the credit of each lessee after calculating that lessee's percentage contribution to the service charge and the amount paid on account. These amounts must be certified.

83. The information required as set above is all contained in the Respondent's company accounts and the account statements kept for each lessee. Each lessee can therefore work out his or her share of the service charge and the amounts paid to it with relative ease. However, the lease states as follows;

> As soon as practicable after the expiration of each year ending on the Twenty fourth day of June the Association shall ascertain and certify the amount of the actual maintenance charge for the preceding twelve months and the amount standing to the credit of the reserve fund and serve on the Lessee a copy of such certificate

84. That essential pre-condition is not currently being met. Until it is, balancing sums of service charges are not payable or if there is an excess paid by the lessee over the year, no such sum may be retained by the Respondent[5].

Reserves

85. Two points were raised here by the Applicant. First, that there was no provision in the lease for there to be a reserve fund. There is clearly such a provision. Read as a whole, the sixth schedule clearly provides that the maintenance charge to be levied on lessees will consist of the costs of its obligations under the lease and to provide reserves for future anticipated expenditure. The fact that other clauses (dealing with payments on account) go on to refer to 'the relevant year' and 'such year' do not limit payments by lessees to payments only in respect of the current year rather than a reserve for future years.

86. The second point raised is that, contrary to the Respondent's practice, there is no power in the lease for the credits on the lessees' accounts to be put to the reserve fund rather than set against the service charge for the following year. The Respondent accepted in the hearing that this cannot be done.

Costs and fees

Fees

87. The Applicant paid fees of £250.00 to the Tribunal in respect of this application. Bearing in mind that she has been successful on one part of her application and given that she had to make this application in order to win on that point, the Tribunal determines that the Respondent should return her fees to her. That should be done within 28 days of the date of this decision.

Costs

88. The Tribunal has the power to make an order preventing a landlord from placing costs that it incurred in proceedings of this kind on the service charge (payable by all leaseholders as per their relevant percentages).

89. Given that the Applicant was only successful on a small element of her application and the directors were put to a great deal of work, the Tribunal is of the view that, if any costs have been incurred in the proceedings by the Respondent of a kind that the lease allows to be placed on the service charge, the Tribunal will not prevent those costs being added.

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[5] This does not affect the Respondent's rights to claim payments on account in June and December or additional payments on account as per clause 4.3 of the sixth schedule.

M Martynski

Mark Martynski
Tribunal Chairman
31 August 2010

THE RELEVANT STATUTORY PROVISIONS

20 Limitation of service charges: consultation requirements

(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) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which 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.

Schedule 4
Part 2Consultation Requirements for Qualifying Works for Which Public Notice is Not Required
Notice of intention

8

(1) The landlord shall give notice in writing of his intention to carry out qualifying works—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) invite the making, in writing, of observations in relation to the proposed works; and

(d) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

9

(1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

10

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

Estimates and response to observations

11

(1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out—

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord—

(a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—

(a) each tenant; and

(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)—

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates;

(c) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

12

Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

13

(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)—

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

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.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.