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Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/OOAW/LSC/2009/0843

THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 20ZA of the Landlord and Tenant Act 1985

Applicant: Consort House Management Limited

Respondent: Nexus Holdings Inc.

Premises: Consort House, 45-46 Queensgate, London SW7 5HR

Date of Application: 23 March 2010

Date of Hearing 6 & 7 May 2010

Appearances for Applicant: Mr R. Strang of counsel
Mr C. Brandt - Developol Ltd – Managing Agent
Mrs E. Stock – Director
Lady Fretwell - Director

Appearances for Respondent: Mr Kharlamov
Mr Kharlamov (son) 7 May only

Leasehold Valuation Tribunal: Mrs B. M. Hindley LL.B
Mr P.S. Roberts Dip Arch RIBA
Mr L.G. Packer

Date of Tribunal's Determination 10 May 2010:

1. This is an application, received on 23 March 2010, under Section 20ZA of the Landlord and Tenant Act 1985.
2. It arises as a result of a previous application, dated 22 December 2009, made by the applicants under Section 27A of the Landlord and Tenant Act 1985.
3. As part of his response to the application under Section 27A, the respondent also called into question the compliance of the applicants with the requirements of Section 20 of the Landlord and Tenant Act 1985 when major works were commenced on 5 May 2009.
4. In their statement of case, produced in response to the Tribunal's Directions issued as a result of the Pre Trial Review held on 3 February 2010, in connection with the application under Section 27A, the applicants maintained that there had been compliance with Part 2 of Schedule 4 of the Service Charge (Consultation Requirement) (England) Regulations 2003. They maintained that notice of the works had been provided at an AGM of the applicant management company in October 2008 and that further information had been posted on the large mirror in the main entrance hall over the table. They considered that this went 'far beyond the minimum statutory requirements in that it described the 'works' by reference to specifications and estimates'.
5. The applicants went on to say that if the Tribunal disagreed with this view they would seek dispensation under Section 20ZA on the basis that the respondent had not been misled and had suffered no prejudice.
6. At a hearing on 6 and 7 May 2010 the Tribunal considered both the Section 27A application and the Section 20ZA application. However, because of the applicants' non compliance with Directions the Tribunal had no choice but to adjourn the Section 27A application until more information had been provided but they were able to consider the Section 20ZA application.
7. At the commencement of the hearing Mr Strang immediately conceded that he could not support the contention of compliance with Section 20.
8. Mr Strang explained that the applicants had purchased the freehold in September 2004 and that all fourteen leaseholders held one ordinary share in the applicant company. At the material time four of the leaseholders (occupying flats 1, 10, 11 and 14) were directors of the company.
9. From March 2005 until September 2008 Haywards Property Services had been employed as managing agents of the property. In September 2007 they had written to leaseholders notifying them of the intention of setting up a Reserve Fund for future major internal and external works. When they went into liquidation the management had been taken over by Mr Cedric Brandt of Developol Ltd.
10. Giving evidence to the Tribunal Mr Brandt explained that he was the brother of the chairman of the management company, Christopher Brandt, (Flat 14), that he had no professional qualifications and had not previously acted as a managing agent. He said that he had been appointed initially on an interim basis from June 2008, when Haywards had not been responsive for months and shortly afterwards had gone into administration. He had no formal written contract.
11. Mr Brandt said that a specification for refurbishment of the common parts had been drawn up some time previously by a leaseholder who had become ill and that he had been charged with the task of updating it.

12. To this end he had engaged the services of Sarah Whittington MRCS of Alexandra Estates Ltd (chartered surveyors). She had drawn up a revised specification and sent it for tender in December 2008 to three contractors. She had subsequently produced a tender report and advised the appointment of AOC Contractors, who had submitted the lowest tendered sum being £77,581.25. She had suggested two options for reducing costs and the Directors had chosen Option 2 on an amended specification to give a revised sum of £60,486.79. In the event a further amended specification, dated 13 May 2009, had been adopted to give a contract sum of £70,583.79..
13. Leaseholders had been informed on 20 April 2009 that Listed Building consent was being sought from the Royal Borough of Kensington and Chelsea. On 27 April 2009 leaseholders had been sent the priced specification. Work had commenced on 5 May 2009 and the final account sum, adjusted for variations, was £84,967.35p. excluding VAT and professional fees. The work had been completed in September 2009.
14. Mrs Stock (Flat 1) said that the major works had been discussed at the management company's AGM's in September 2007 and October 2008. At the latter only seven flats had been represented. The Directors had been kept informed of progress by e.mail by Mr Brandt. She added that a sample board had been set up on the third floor displaying various colour and material options for the refurbishment.
15. Lady Fretwell (Flat 11) said that she had hand delivered notices of the AGM to leaseholders and these had emphasised the desirability of attendance. However, in answer to the Tribunal's questions she agreed that no agenda had been attached and the fact of the common parts proposed work had not been mentioned. In the notice. She added that various ad hoc meetings had also taken place, some open to all with others confined to Directors.
16. Both Mrs Stock and Lady Fretwell said that information about the proposed works had been posted on the mirror in the ground floor entrance hall. Mrs Stock added that there had been a degree of urgency about the works since a series of repaired leaks had caused damage which had not been fully redecorated.
17. Mr Strang, whilst conceding that the conduct of the applicants did not comply with the requirements of Section 20, sought dispensation on the basis that the respondent was a member of the applicant body which had been working in a difficult situation as a result of the failure of Haywards. He had been notified as early as 2007 and could have chosen to participate in the discussions at the AGM. Mr Strang submitted that the leaseholders had been acting collectively and that the directors had been charged to act on their behalf. There had, thus, been a framework within which the respondent could have participated and it had not been established that he had suffered significant prejudice.
18. Mr Strang drew the Tribunal's attention to two decisions of the Upper Tribunal (Lands Chamber) and the Lands Tribunal - Daejan Investments v. Benson [2009] UKUT 233 (LC) and L. B. Camden v. Leaseholders of 30-40 Grafton Way LRX/185/2006. In the first case he found support for dispensation from the remarks of Lord Justice Carnwath that 'the Tribunal may reasonably take a more rigorous approach to non compliance by a local authority or commercial landlord, than to a case where the landlord is simply a group of lessees in another form'.

19. The respondent maintained that he had not been consulted about the works. He denied receiving the notices of the AGMs' or the ad hoc meetings or that anything had been posted on the mirror in the entrance hall. He said that it was not until 27 April 2009 that he had received a copy of the revised priced specification (Option 2). He had immediately written letters outlining his objections both to the lack of consultation and to some of the proposed works, in particular the replacement of the marble flooring to the ground floor entrance hall, which he considered was in good condition and that its removal would detract from the appearance of the property and diminish its value. He had received responses from both Mr Cedric Brandt and Lady Fretwell on 3 and 4 May respectively that the marble flooring was not to be replaced but would be cleaned and sealed. However, during the course of the refurbishment the marble flooring had, in fact, been overlaid with ceramic tiles.
20. The respondent contended that the purpose of Section 20 was to notify and to obtain views from leaseholders and that even were there to be full consensus there were no exceptions provided for in the legislation. He said that the prejudice he was suffering was his liability for the cost of the works, which he said were not repairs but expensive improvements, which he considered to be both unnecessary and too expensive for the works carried out. He had not been consulted on the content of the works which, in his view detracted from the value of the building, and had not been given the opportunity to nominate a contractor to be invited to quote for the works. He said that he had such a contractor. He had then been forced to incur further costs to obtain legal advice to mount his challenge.
21. The Tribunal, prior to the hearing, had inspected the subject property and the works to the common parts as a prelude to their consideration of the Section 27A application. They found that a comprehensive refurbishment had taken place to a high standard and that the spacious common parts were now in excellent condition with tiled floors, white paintwork with grey contrasts, beige carpeting, wall lighting and carefully chosen new or repainted furniture. The completed works reflected a particular style of interior decoration.
22. Section 20ZA allows the Tribunal 'to dispense with all or any of the consultation requirements.....if satisfied that it is reasonable to dispense with the requirements'.
23. The Tribunal notes that in this case although the applicants had made no attempt whatsoever to comply with the requirements they had maintained, until the start of the hearing, that what they had done went 'far beyond the minimum statutory requirements'. This suggests to the Tribunal that either they were totally ignorant of the requirements or chose deliberately to disregard them in circumstances where no urgency or other valid reason existed.
24. The Upper Chamber in the Daejan case commented with approval on the observation in the Grafton case that 'the principal consideration for the purpose of any decision on retrospective dispensation must, in our judgment, 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. An omission may not prejudice a tenant if it is small, or if material made available in another context and the opportunity to comment on it, it is rendered insignificant. Whether an omission does cause significant prejudice needs to be considered in all the circumstances. If

significant prejudice has been caused we cannot see that it would ever be appropriate to grant dispensation'.

25. In the Tribunal's opinion the omission here was not small. It was not, as it had been in the Daejan case, a partial failure to comply with the requirements. It was a total failure to follow the statutory requirements and the material, allegedly made available in the form of notices posted on the mirror or invitations to AGMs and other meetings in no way made up for the lack of proper consultation. It is clear that the refurbishment was planned and carried through in an informal way, guided primarily by the Directors. The very late decision to tile over the marble flooring in the entrance hall provides a good illustration of this informal approach. Whilst the Tribunal is not able to comment on the condition of the marble it was very apparent to them at their inspection that the refurbishment reflected a certain style which, however well executed, might not be to everyone's taste and that the previous marble and gilt style, as described at the inspection, might have its supporters.
26. The Tribunal carefully considered Mr Strang's argument that the respondent had not suffered significant prejudice. However, it was evident from the respondent's evidence at the hearing that he had many and specific observations on the works. It therefore appears to the Tribunal at least possible that he would have expressed them, if he had had the opportunity to do so – this likelihood is supported by the fact that the respondent had made some of the points in writing, as a company member, after he received the specification in April 2009. The Tribunal concludes that on a balance of probabilities the respondent would have had comments to make in statutory consultation, and that he suffered material prejudice in not being able to make them.
27. It was observed at the hearing – and acknowledged by the respondent – that even if there had been due statutory consultation, his views on the work would not necessarily have prevailed. But this is not sufficient, in the Tribunal's view, to show that the loss from not having the opportunity is theoretical - that the respondent's observations would not have made any actual difference to the works carried out or their costs. Whilst some of the respondent's criticisms were about the whole idea of refurbishment, other points were about practical details and costs, and it is at least possible that his comments, if they had been submitted, and the applicants had had due regard to them, could have reduced costs. Similarly, alternative contractors whom the respondent might have suggested might have offered lower tender prices. This can only be a matter of speculation, not certainty – but the possibilities cannot reasonably be ruled out.
28. The Tribunal also invited the applicants at the hearing to comment on the financial consequences of not allowing the dispensation and whether this would undermine the company's ability to carry on the effective management of the block. The Tribunal was told that the loss of the respondent's contribution would be regrettable, but not disastrous. Even if other leaseholders likewise challenged their contributions it would be open to the company, following due process, to seek a cash call to get back on track. The Tribunal is, therefore, satisfied that this issue does not enter into the consideration of the reasonableness of granting or refusing dispensation.
29. As a result of Directions issued on 26 March 2010 some five leaseholders wrote consenting to a dispensation. The Tribunal notes that they include all four Directors and one other. The Tribunal also notes that the lease of one

Director (flat 1) does not provide for any contribution to be made to works to the interior common parts.

30. Giving due weight to the submissions of both parties and bearing in mind the observations of the Upper Chamber and the Lands Tribunal, the Tribunal is not persuaded that it would be reasonable in all the circumstances of this case to grant the requested dispensation. In their opinion the expressed support for the dispensation does not outweigh the other considerations set out above.
31. Accordingly, the dispensation is refused.
32. In its determination of the outstanding Section 27A application the Tribunal will deal with all aspects of costs after hearing submissions from both parties.

Chairman B. M. Hindley
Date 10 May 2010