



LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 20ZA OF THE LANDLORD AND TENANT ACT 1985

Case Reference: LON/00AW/LDC/2013/0030

Premises: Addisland Court, Holland Villas Road, London W14 8DA

Applicant(s): Addisland Court Company Limited

Representative: Douglas & Gordon (Managing Agents)

Respondent(s): The leaseholders of the subject flats as set out in the schedule to the application.

Leasehold Valuation Tribunal: Mr J P Donegan (Chairman)
Mrs A Flynn MRICS (Valuer Member)

Date of Directions: 08 April 2013

Date of Further Directions: 16 May 2013

Date of Determination: 27 June 2013

10P8

DETERMINATION OF THE TRIBUNAL

- A. The application for dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") is granted.

BACKGROUND

1. By an application made on 22 March 2013 the Applicant seeks dispensation from some of the consultation requirements imposed on the landlord by section 20 of the Landlord and Tenant Act 1985.
2. The application relates to the replacement of the heat exchangers and associated components in the communal hot water system at Addisland Court, Holland Villas Road, London W14 ("the Premises").
3. Directions were given on 08 April 2013 and the application was referred for a paper determination. No request for an oral hearing has been made any of the parties.
4. The leaseholders of 3 of the flats at the Premises have filed consents to the application. The leaseholders of 5 flats, including Mr and Mrs Mallorie of Flat 4 at the Premises, have filed objections. The remaining leaseholders have not responded to the application.
5. The Applicant's statement of case, dated 24 April 2013 indicated that the work to replace the heat exchangers was underway.
6. Mr and Mrs Mallorie have filed a detailed statement of case objecting to the application. In their statement of case they raised various issues and made the point that the Applicant has not produced any report from their professional advisers, detailing the cause of the (legionella) problem and suggesting solution/s.
7. Further directions were given on 16 May 2013 and the Applicant filed a reply to Mr and Mrs Mallorie's statement of case on 22 May 2013. The Tribunal was also supplied with minutes from a meeting of the board of directors for the Applicant company, held on 20 May 2013.
8. The relevant legal provisions are set out in the Appendix to this decision.

THE GROUNDS OF THE APPLICATION

9. The Premises are a 1930s apartment block of 42 flats, including a caretaker's flat. The Applicant is the freeholder of the Premises. The Premises are managed by Douglas & Gordon, on behalf of the Applicant.
10. A programme of water temperature sampling is carried out at the Premises on a monthly basis. Sampling in May 2012 revealed that the hot water temperatures were below the recommended guidelines. As a consequence the communal boilers were replaced in November 2012.

Subsequent samples have revealed that the temperatures of water going in from the new boiler/s and on the return are well above the recommended guideline. However the temperature of water going out of the heat exchanger and up to the flats is only 40C and is inadequate. The low water temperature is in the range (25-40C) where legionella bacteria can proliferate.

11. Sampling for legionella was undertaken in December 2012. The results were issued January 2013 and legionella was detected. Further sampling was undertaken and legionella bacteria were discovered in 7 out of 10 samples.
12. The water engineers instructed by the Douglas & Gordon, Thomson Environmental Service Limited ("Thomson") recommended the replacement of the hot water system in a risk assessment dated 08 January 2013. Thomson also provided an advisory/guidance letter to be issued to all residents at the Premises setting out the connection between low hot water temperatures and the positive legionella results and the risk of Legionnaires' disease. The letter also advised against showering, as the primary route of infection in a residential building would be via the inhalation of aerosolised particles created by showering.
13. Douglas & Gordon instructed a design engineer, Mr Neil Horswood, to prepare a specification for the replacement of the heat exchangers. Tenders were obtained from the current boiler engineer, Cofely GDZ Suez Limited ("Cofely") and Quotehedge Limited. The Cofely tender was preferred and they were instructed to undertake the works.
14. The Applicant has not complied with all of the consultation requirements set out in part 2 of schedule 4 of the Service Charges (Consultation etc) (England) Regulations 2004 ("the 2004 Regulations").
15. Douglas & Gordon served notice of intention on the Respondents on 14 March 2013. A statement of estimates was served on the Respondents only 7 days later, on 21 March 2013. The Applicant did not wait until the end of the initial 30-day consultation period before obtaining tenders or serving their statement of estimates. Further they instructed Cofely without waiting for any nominations or observations from the Respondents.
16. The total anticipated cost of the work including VAT and supervision fees, as set out in the statement of estimates, is £72,704.40. The minutes of the board meeting held on 20 May 2013 state "*..Cofely have almost completed work on site and are ready to switch over to the new system on 30 May...*". This suggests that the replacement of the heat exchangers has now been completed.
17. The Applicants ask that dispensation be granted upon the grounds that the replacement of the heat exchangers was urgent. They point out

that the water temperature was in the range that legionella bacteria can proliferate. As a consequence they felt unable to embark upon the full consultation process that would take a minimum of 60 days before instructing contractors to replace the heat exchangers. In their notice of intention, Douglas & Gordon pointed out that the hot water was losing about 30C, as it goes through the heat exchanger. They stated *"..this is possibly contributing to the legionella bacteria proliferation which has been found in the communal hot water system.."*

18. The Applicant considers that it was unfeasible to complete a full consultation exercise before replacing the hot water system given the current legionella in the system and the inconvenience to residents (who had been advised not to use their showers).

OBJECTIONS

19. Mr and Mrs Mallories' objections to the application were set out in their detailed statement of case. There was also a short statement from Mr Mayassi, the leaseholder of Flats 26 and 33 at the Premises, setting out his objections. The leaseholders of two other flats notified the Tribunal that they opposed the application, without detailing their objections.

20. The objections received can be summarised as follows:

20.1 Insufficient evidence that the cause of the problem has been identified – Initially the Applicant hoped that the replacement of the boiler would cure the problem of low hot water temperatures. This has not proved to be the case. The documents in the Applicant's statement of case identify various possible causes of the low temperatures and the objectors are not satisfied that replacing the heat exchangers will cure the problem.

20.2 Selection of same firm of contractors – Cofely have had a maintenance contract for the boilers for at least 10 years and replaced the boilers last November. The new boilers do not work satisfactorily, which suggests some failings on Cofely's part. Cofely were selected to replace the heat exchangers even though their tender was the highest. The implication is that Cofely were selected due to their long standing relationship with the Applicant.

20.3 Lack of faith in Applicant's ability to rectify the problem without incurring excessive and unnecessary costs – The objectors raise various concerns about Mr Horswood's findings and recommendations. They suggest that he (and Douglas and Gordon) do not know how many flats at the Block are linked to the hot water system. The objectors also refer to correspondence passing between the Environmental Health Office at the Royal Borough of Kensington and Chelsea and Douglas and Gordon. This suggests that the replacement of the heat exchangers is not guaranteed to cure the problem.

20.4 Adequate time for section 20 consultation - The objectors point out that the Applicant has been aware of the problem with the heat exchangers since November 2012. It was six months before Cofely started work in late April 2013. The objectors suggest that the Applicant had sufficient time (between November 2012 and April 2013) to undertake a full section 20 consultation. They also allege that there has been a history of non-compliance with section 20 at the Premises.

21. The objectors have also referred to unsafe water at the Premises, the inability to use showers and problems with subletting or selling Flats. Within the Applicant's statement of case was evidence that the subtenant of Flat 15 had moved out in response to notification of the legionella bacteria in the hot water system system.
22. Mr and Mrs Mallorie's statement of case helpfully addresses the consequences of dispensation being granted. In that event the cost of the works might be more than their actual value, given that it is unknown whether replacing the heat exchangers will cure the problem. Mr and Mrs Mallorie's concern is that the work must be effective and they suggest that an independent survey be undertaken by a suitable qualified heating engineer, who is independent of Douglas & Gordon or Cofley, to identify the cause of the problem.

DECISION

23. In coming to their decision, the Tribunal considered the statements of case, the Applicant's reply and the letters of objection and support. The Tribunal also considered the principles established by the Supreme Court in **Daejan Investments Limited v Benson [2013] UKSC 14** and focussed on any prejudice that might be suffered by the Respondents, if dispensation were granted.
24. The Tribunal concluded that the replacement of the communal hot water system is/was urgent given the existence of legionella bacteria in the system, the risk of Legionnaires Disease and the recommendation that residents do not use their showers. In addition there is the adverse impact that the legionella problem has on the subletting and potential sale of flats, as outlined by the objectors. There is also the possibility that a failure to take urgent action could give rise to claims against the Applicant for breach of covenant or in negligence or nuisance.
25. In the Tribunal's experience, completing a full section 20 consultation will normally take substantially longer than 60 days. Very often it will take 3-4 months. Thomson recommended the replacement of the hot water system on 08 January 2013. There was a slight delay in obtaining the specification, with the result that the notices of intention were not served until 14 March 2013. Had the Applicant embarked upon a full consultation exercise then the likelihood is that work could not have started until late June 2013. By curtailing the consultation, the

Applicant was able to instruct Cofely in April 2013 and it appears that the work has now been completed.

26. The Tribunal carefully considered the objections put forward by Mr and Mrs Mallorie and Mr Mayassi. They raise legitimate concerns about the manner in which the boilers and heat exchangers have been replaced in quick succession. They also refer to the lack of expert evidence to justify the replacement of the exchangers. Given the cost and scope of the work the Tribunal would have expected to see a detailed report from Mr Horswood or a heating engineer, identifying the cause of the problem and the remedial work required. However the Tribunal was persuaded that the work was urgent for the reasons set out at paragraph 23 of this decision. Further the Tribunal consider it reasonable to proceed with the work, given the recommendations made in the Thomson risk assessment.
27. On balance the Tribunal concluded that there would be no material prejudice to the Respondents if dispensation is granted. The objections made regarding the cost and value of the work and the selection of Cofely can be pursued separately in an application under section 27A of the 1985 Act. There is nothing to stop any of the Respondents from disputing the cost of the work in the future, once it is known whether the replacement of the heat exchangers has cured the problem. In addition this decision does not prevent the Respondents from challenging the cost of replacing the boilers.
28. The objection regarding delay is one made in hindsight and the Applicant acted reasonably promptly once they received the Thomson risk assessment. Further any delay on the part of the Applicant will not give rise to prejudice to the Respondents, if dispensation is granted.
29. For the reasons set above the Tribunal have concluded that it is reasonable to dispense with the full consultation requirements in section 20 of the 1985 Act. The Tribunal also considered whether the grant of dispensation should be conditional upon the Applicant complying with any specific terms. Given that the work has already been undertaken and the Respondents can still challenge the cost of the work, it is inappropriate to impose any conditions on granting dispensation. It follows that dispensation is granted unconditionally.
30. Finally, the Tribunal note that the minutes of the board meeting held on 20 May 2013 state that the Applicant may be put to additional cost by virtue of the objections made by some of the Applicants. The objections were legitimate and reasonable. The objectors should not be criticised or penalised for opposing the application, even if this does give rise to additional costs.

Name:



J Donegan

Date: 27 June 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a Tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20 (1)

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contribution 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

Section 20ZA (1)

- (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.

Section 27A

- (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
- (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a Leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.

- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the Tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

- (5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.