10732

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2014/0360** **LON/00BG/LDC/2014/0109**
Property	:	**OSIER COURT, OSIER STREET, LONDON E1 4AP**
Applicant	:	**STEPHANIE GREIG** **PAUL VERNON** **JOHN O'REILLY** **JIM WALLACE** **DAN IRWIN** **CAROL BURNS**
Representative	:	**Carl Fain, Counsel**
Respondent	:	**SANDRINGHAM LAND LIMITED**
Representative	:	**Daniel Dovar, Counsel**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985, Limitation of Landlords Costs of Proceedings under section 20C, dispensation of consultation requirements section 20ZA Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge S Carrott** **Mrs J E Davies FRICS** **Mrs R Turner JP BA**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 20 November 2014**
Date of Decision	:	**10 April 2015**

DECISION

DECISION

The Tribunal determines as follows –

(1) The Respondent is not entitled to service charges for costs incurred prior to 18 June 2009.

(2) The Respondent is granted dispensation pursuant to section 20ZA of the Landlord and Tenant Act 1985 for the costs incurred in relation to the major works carried out by it and which is the subject of this determination.

(3) Dispensation is granted on terms that the Respondent shall –

(a) Pay to the First and Second Applicants their legal costs assessed at £6000 within 14 days.

(b) Pay the additional sum of £600 to the First and Second Applicants being the sums previously ordered to be paid by the Respondent within 14 days.

(c) Pay the Third Applicant's costs assessed at £140.

(d) Pay the Applicants' surveyors costs of £3024.

(e) Reimburse the Applicants with the application and hearing fees of £630.

(4) The Tribunal makes an order pursuant to section 20C of the Landlord and Tenant Act 1985.

(5) The decision in relation to the individual challenges to service charge items is set out in the table attached.

BACKGROUND

1. The Applicant's are lessees of flats at Osier Court. Osier is a 1930's purpose built block originally consisting of 16 flats and a bungalow. At the end of 2008 the Respondent commenced construction of an additional 14 flats adjacent to and on top of the original block.

2. In 2004 Prevost Chartered Surveyors was instructed on behalf of the landlord to prepare a specification for communal internal and external repairs repair and redecoration works to the original block including the renewal of flat roofs, work to the building elevations, redecoration and works to the paths, boundary walls and hard landscaping around the building.

3. The works were carried out between 2007 and 2009. The landlord contended that it had incurred major works costs for which the lessees are liable in the sum of £168,046 as detailed in a section 20B(2) notice dated 17 December 2010 and the construction of the additional 14 flats, the major works and the resulting service charges have given rise to two applications.

4. In Application LON/00BG/LSC/2014/0360 (the service charge application) the Applicants require the Tribunal to determine the following questions in relation to service charges for 2008-2009.

(1) Whether section 20 consultation was properly undertaken in relation to the original block (flats 1 to 16);

(2) Whether the '18 month rule' should apply in relation to the original expenditure; and

(3) Whether the items of service charge listed in the application are due only by the tenants of the original block and/or what amounts are properly due to the landlord for repairs and redecorations for the original part of the block.

5. In application LON/00BG/LDC/2014/0149 (the 20ZA application) the Respondent applies for dispensation from the consultation requirements.

HEARING

The Applicant's Submissions

6. At the hearing of the application Mr Carl Fain appeared for the First and Second Applicants. Mr John O'Reilly appeared in person. The fourth, fifth and sixth Applicants were not present at the hearing but still wished to continue with their application. They relied upon the submissions of Mr Fain and the Applicants' Statement of Case.

7. Mr Daniel Dovar appeared on behalf of the Respondent.

8. Mr Fain first dealt with the issue of 20B of the 1985 Act. He drew the attention of the Tribunal to the service charge demand, which was served on the First and Second Applicants at page 808 to 811 of the Bundle. This notice was served on 24 June 2014. He stated that all of the other tenants were served with this demand. He further explained that since the works were carried out between 2007 and 2009 the effect of section 20B(1) of the 1985 Act would mean that the works would be time barred under the 18 month rule.

9. He accepted that the landlord served a section 20B(2) notice on 17 December 2010: pages 723 to 724 (although the Applicant Mr O'Reilly did not accept that he had been served with such a notice) but contended that any costs incurred before 18 June 2009 are irrecoverable.

10. He submitted that save for the Conkers gardens invoice and Clement Hall Invoices (which he accepted were not barred by section 20B), the remaining works were paid pursuant to the contract with ML Hart Builders Ltd. A copy of that contract was not before the Tribunal although it is clear from the representations of Mr Fain that a copy of the contract was requested for this hearing but had not been disclosed.

11. Mr Fain, taking the Tribunal to the relevant documents explained that the total value of the work undertaken by ML Hart Builders Ltd was £1,620,518 on 8 June 2009 [page 716 of the trial bundle]. There had been previous payments totalling £1,425,736.256 in accordance with Interim Valuation No 15. Therefore prior to 18 June 2009, £1.4m had been paid in respect of the overall works. Mr Fain referred the Tribunal to the witness statement of Mr Peter Jones, partner in the firm of CN Associates LLP, Chartered Surveyors and the Respondent landlord's witness, which generally confirmed Mr Fain's figures.

12. Mr Fain further drew the attention of the Tribunal to valuation No 14 at pages 708 – 711. Although that valuation did not separate out the cost of the works which the Respondent landlord seeks to recover, Mr Fain contended that that document illustrated that a high percentage of the works had been completed and hence paid for and thus a high percentage of the costs of the work had been incurred prior to the payment in accordance interim Valuation No. 14.

13. By way of example Mr Fain referred to the scaffolding which would have been included in the preliminaries which were 85% complete and paid less a retention of 5%. Thus according to Mr Fain 80.75% of the scaffolding costs were time barred. Likewise he submitted that 40% of the 'Repairs & Redecorations' work had been undertaken and paid less a retention of 5% and that therefore 35% of the Repairs and Redecorations were time barred. He stated that the roof covering and rain water goods had been almost 100% complete less a retention of 5%. Thus 95% of the roof work was time barred.

14. Mr Fain contended that practical completion of the works occurred on 18 June 2009 although the landlord had not yet provided a contract sum analysis for valuation No 15. Accordingly Mr Fain submitted that the relevant works or a high proportion of the works had been completed and paid for prior to 18 June 2009 and thus were not payable pursuant to section 20B.

15. We heard evidence from Mr O'Reilly on the issue of section 20B. In short it was Mr O'Reilly's evidence that he had not been served with a copy of the section 20B(2) notice. He explained that he did not reside at Osier Court and that his flat was rented out. He had supplied an address for correspondence which contended the landlord was aware of yet he was not provided with a copy of the section 20B notice.

16. We also heard evidence from Mr Ian Woodhouse a director of the Respondent on the issue of service of the notice on Mr Reilly. He told the Tribunal that he sent out the section 20B notices on behalf of the Respondent to the addresses at Osier Court. He said that the notices were individually addressed. He said that he was sure that a letter was sent to Mr O'Reilly at Flat 9 and that he did not have another address for Mr O'Reilly. He did want to send the letters simply to the Tribunal appointed manager Maunder Taylor but it was the view of Maunder Taylor that since it was prior to their appointment the letters had to be sent to the individual lessees.

17. On the issue of consultation Mr Fain submitted that there was no issue between the parties. The Respondent admitted that it had failed to comply with the consultation requirements and the real issues were whether or not the Applicants had suffered prejudice, whether there should be dispensation and if so on what conditions.

18. Mr Fain submitted that there was very real prejudice in the present case which had manifested itself in the following ways –
    (1) The Respondent had chosen the contractor in July 2007 before it served its purported notice of intention.
    (2) The purported statement of estimates dated 26 September 2008 was not served on his clients, the first and second Applicants.

(3) The Respondent commenced works before the consultation notices thereby preventing the tenants from making any observations.
(4) Had the Respondent complied with the consultation requirements and informed the tenants that they desired to instruct the contractor who was working on the new build, then the tenants could have made observations about the extent and scope of the works and any potential overlap.
(5) Further if there had been compliance with the consultation requirements then the tenants would have made observation to the overlap of the set of works and the Respondent would have required its proposed contractor to separate out the costs so that both the Respondent and the tenants would know what costs were relevant to the old block.
(6) The Respondent's conduct meant that it was almost impossible for the tenants to work out what costs were actually incurred that the tenants were liable to pay but instead the tenants were left with the almost impossible task of trying to calculate the costs which were actually incurred with in the absence of proper documentation.
(7) The failure to properly consult meant that the tenants were charged for the costs of works which were not carried out at all and with a potential liability for costs which was in excess of the figure that was appropriate for the works.

19. Mr Fain's primary submission was that dispensation should not be granted in this case given the very real prejudice set out above.

20. In the alternative Mr Fain argued that if dispensation was to be given then conditions should be attached, namely that –
(1) The costs incurred are reduced to £28,261 (being the costs, which the Applicants contend, were actually carried out and were reasonably incurred within section 19 of the 1985 Act);
(2) The Respondent costs of £6000 (Counsel's fees).
(3) Surveyors costs of £3,024; and
(4) Tribunal fees of £630.

21. In his written closing submissions dated 3 December 2015 Mr Fain also drew the Tribunal's attention to the fact that there had been two previous applications before the Tribunal and the appointment of a manager. The Respondent was ordered by the Tribunal to pay the first and second Applicant's costs of £100 in LON/00BG/LSC/2007/0423 to be paid within 7 days of 14 January 2008,and the application fee and hearing fee of £500 in LON/00BG/LAM/2009/0023 within 14 days of 18 February 2010. Neither amount has been paid. He wished payment of these sums also to be a condition of dispensation.

22. Finally Mr Fain addressed the Tribunal on the issue of whether the costs were payable in any event.

23. He submitted that the Respondents now accepted that there were indeed costs which it had demanded which in fact had not been incurred and he referred the Tribunal to the Respondents revised claim of £119,679 for the relevant costs set out at pages 971 to 973 of the trial bundle. He stated that the First and Second

Applicants (and by extension all of the Applicants) disputed this sum in any event.

24. The basis of challenge was on three grounds –
    (1) Certain works were not carried out;
    (2) There were works of improvement or alteration which did not fall within the landlord's covenants in the fourth schedule to the leases because the work did not fall within the definition of 'maintaining repairing redecorating and renewing' and the Respondent did not provide evidence that the improvement or alterations work would provide best value for the tenants by a life-cycle costing analysis (as was used in *Wandsworth LBC v Griffin [2000] 2 EGLR 106*; and
    (3) The apportionment of shared costs between the new building and the old block was unfair; any shared costs should be apportioned 16/30th in respect of the old block because there were 16 existing flats and 14 new flats.

25. On behalf of the tenants we were referred to the reports of Mr Peter Mountain MICIOB, MCABE and heard oral evidence from him as to the particularised challenges. Mr Mountain is a building surveyor with more than 45 years experience in the construction industry having working in both contracting and private practice. We comment on his evidence in the reasons for our decision.

26. Mr Fain concluded his submissions by saying that subject to section 20B and dispensation, the total works that A1 and A2 accept fall within the provisions of their leases, were actually carried out and reasonably incurred within the meaning of section 19 of the 1985 Act was £28,261.

The Respondent's Submissions

27. Mr Dovar did not accept that the Respondent had incurred costs prior to a consent order which had been entered into between the Respondent and ML Hart Builders Limited on 4 December 2009. The consent order is at page 53 of the bundle and recites that 'the proceedings be discontinued' and that there be no order as to costs. This was because a dispute arose over the late completion of the contract with the effect that final payments for the works were not made until 21 December 2009.

28. Mr Dovar was not in a position to provide the Tribunal with copies of the pleadings in that matter.

29. Mr Dovar submitted that the reliance upon interim payments did not assist the Applicants because –
    (a) The interim payments were in effect payments on account of the contract sum which was evident from the fact that -
        (1) there were negative interim payment certificates which indicated that the actual cost incurred at any one time was fluid and subject to change until the final contract sum;
        (2) there was retention of 5% for all of the works;
        (3) they were part payments for the final sum;

(4) the dictionary definition of 'interim payment' is 'an amount of money that it paid before the total amount of money owed is decided' (Cambridge Dictionaries).

(b) The Applicants could not contend that all of the works fell within the payment certificates that were outside of the section 20B time limit.

(c) It was artificial to consider individual work under interim payments made under one contract because if that were permissible, it would be possible for a landlord to avoid works becoming qualifying works under section 20, by simply making numerous interim payments for work each under threshold.

31. On the issue of dispensation Mr Dovar referred the Tribunal to *Daejan Investments v Benson [2013] 1 WLR 854,* which we refer to more fully in the reasons for our decision below. He submitted that the Applicants had not shown prejudice by reason of any lack of consultation and that many of the issues raised by the Applicants were directed to the development work for which the Applicants had no right of consultation.

32. He submitted that if financial conditions were to be imposed that those financial conditions should be limited to the cost of the section 20ZA application and not the section 27 application because although related, they were two entirely separate matters.

33. The Tribunal heard evidence from Mr Buyers on behalf of the Respondent as to the various challenges to individual service charge items.

REASONS FOR DECISION

34. On the issue of section 20B of the 1985 Act the Tribunal found the evidence of the Applicants and the submissions of Mr Fain, fortified as they were by cogent authorities, compelling. We found also on the evidence of the parties it was likely on the balance of probabilities that Mr O'Reilly was served with the section 20B(2) notice at Flat 9.

35. Section 20B protects lessees from service charge demands made in respect of costs incurred more than 18 months before the demand. The section provides as follows -

20B Limitation of service charges: time limit on making demands

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a

> Section 20B is one of a number of provisions in the LTA 1985, which are designed to protect lessees from excessive service charges, by limiting the amount the lessor can recover in certain, defined circumstances

36. The section forms part of the test of payability of service charges. It bites on "relevant costs", defined in LTA 1985, s.18 (2) as "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" - so it can apply to any service charge demand under the lease.

37. In Gilje v Charlegrove Securities Limited [2003] 1 All ER 91), Etherton J at paragraph 27 stated:

> "... so far as discernible, the policy behind section 20B of the Act is that the tenant should not be faced with a bill for expenditure, of which he or she was not sufficiently warned to set aside provision. It is not directed at preventing the lessor from recovering any expenditure on matters, and to the extent, of which there was adequate prior notice."

38. Morgan J in LB Brent v *Shulem B Association Ltd [2011] EWHC 1663* explained further -

> "It is obvious that the purpose of section 20B taken as a whole is to impose a time limit on a lessor's ability to make a demand for payment of a service charge ... [but] there is room for speculation as to why precisely this was thought desirable."

39. The issue in the present case is whether or not costs were incurred when the interim or staged payments were made.

40. In *Jean-Paul v LB Southwark UT, LRX/133/2009*, a case where the landlord made stage payments to the contractor, G Bartlett QC held that costs are only "incurred" by the landlord within the meaning of s.20B when payment is made and not when the services are supplied He stated:

> "There is clearly a distinction between incurring liability (i.e. an obligation to pay) and incurring costs, and it is the latter formulation that is used in s.20B."

41. This approach has been followed by the Court of Appeal in *OM Property Management v Burr [2013] EWCA Civ. 479 Wenghold Ltd v Egleton [2013] UKUT 0420 (LC)* and again in *GR Regisport v Dowlen [2014] UKUT 144.*

42. The Tribunal was concerned in the present case that there was very little documentary evidence before it concerning the dispute between the contractors and the Respondent. We were not shown a copy of the pleadings so that we could see how the contractor's claim was formulated. We were not shown any correspondence pre-action or otherwise between the contractors and the Respondents so that we could ascertain objectively the parameters of the dispute between them. The consent order provided by the Respondent in evidence provided the flimsiest of evidence as to the nature of a dispute which appeared

to have been resolved by the withdrawal of proceedings. It did not assist the Tribunal in determining whether costs were incurred as at the date of the consent order.

43. It was for this very same reason that we asked the parties to address us on the question of burden of proof on this issue. We were provided with an excellent excerpt from a book written by the members of Tanfield Chambers which in effect said that the burden of proof should only be resorted to in a situation where there is in effect a tiebreaker. Although we do not say that this was a tiebreaker situation, we are firmly of the view that it was incumbent upon the Respondent to provide some documentary evidence to assist the Tribunal if its case was indeed that costs were only incurred in December 2009. We were not shown a copy of the terms of the contract even though the Applicants requested a copy of the contract for the application before the Tribunal. We were not shown a copy of the pleadings in the action between the contractors and the Respondent and so we were left with very little information to determine whether or not costs were incurred in December 2009.

44. We are of the view that if a tenant raises the 18 month time limit in the application or statement of case and there appears to be evidence in support, the effective burden of proof to show otherwise falls on the lessor's shoulders: see HHJ Rich in *Schilling v Canary Riverside Pte Ltd,* LRX/26/2005, L.T. Here the Applicants in their statement of case raised the matter and the Respondent had ample opportunity to put forward its case. It did not do so in a way which persuaded the Tribunal on the evidence and indeed the Tribunal can only act on the evidence before it.

45. Moreover the Respondent's own evidence confirmed the careful valuation exercise which was carried out at each stage when interim payments were made. It being a question of fact for the Tribunal as to whether costs were incurred, we are firmly of the view on the evidence before us that costs were incurred. Therefore the cut off point so far as any service costs are concerned is 18 June 2009 and the Respondent and the costs incurred prior to that date for the major works are not payable by the Applicants.

46. We should add that we were not assisted by the general dictionary definition of the term *interim payment.* Our function on this issue was to determine the date when costs were incurred within the meaning of section 20B. As the Court directed in *OM Property Management v Burr,* that question is fact sensitive and is to be determined on basis of the evidence before us.

47. On the question of non-compliance with the consultation requirements, non-compliance was admitted by the Respondent in its statement of case and at the hearing by Mr Dovar. The only question for the Tribunal therefore was whether there should be dispensation for those costs incurred after the cut off date 18 June 2009.

48. In Daejan, Lord Neuberger stated that section 20ZA was part and parcel of provisions (i.e. ss. 19 -20ZA) which are directed to ensuring that tenants are not required to pay for (i) unnecessary services or services which are provided to a defective standard and (ii) to pay more than they should for services which are

necessary and are provided to an acceptable standard. The consultation requirements are part of that framework. Thus when entertaining a section 20ZA application the Tribunal should focus on the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the consultation requirements.

49. The Court further held that no distinction should be made between serious and trivial breaches. In all cases it is the fact and degree of prejudice that were critical. On the fact of that case, dispensation was granted on terms.

50. We accept the evidence of Mr Woodhouse, it not being challenged by way of cross examination, that the failure to consult in the present case was due to the Respondent being given very poor advice. However that does not in any sense mitigate the serious prejudice to the tenants in this case. Indeed we accept in its entirety the evidence and submissions of the Applicants as to the nature of prejudice suffered as set out in paragraph 18 of our decision above and as Mr Fain so correctly observes, both applications in this case are as a direct result of the failure of the Respondent to comply with the consultation requirements, the Applicants having to face the shifting sands of revisions and amendments as to scope and costs of the works whilst at the same time being faced with demand for payment. Had there been consultation this would have been avoided and the costs of the major works would have been separated out from the cost of the development of the new 14 flats. The facts of this case emphasise the importance of complying with the consultation requirements and the confusion which can ensue if as in the present case no meaningful effort is made to comply with the consultation requirements.

51. Having said that, it our firm view that given the benefits that the Applicants have received, fairness requires in accordance with the decision of the Supreme Court in *Daejan* that dispensation should be granted.

56. In determining the conditions to be attached to such dispensation we do not accept that any meaningful distinction can be drawn from the two applications before us or for that matter the previous applications which the first and second Applicants were involved in. We also find that it is unfortunate that the Respondent has not seen fit to comply with the previous orders of this Tribunal and are persuaded by Mr Fain that in granting dispensation we should ensure that the previous orders are complied with as a condition of dispensation. We therefore accept in full the conditions requested by Mr Fain and reject the assertion of Mr Dovar that conditions should only be attached in terms of the costs of the 20ZA application.

57. We wish to emphasise to the Respondent landlord that this is a case where not withstanding the decision in *Daejan,* the Tribunal came very close to refusing the application for dispensation because of the very serious prejudice to the tenants and the subsequent confusion that has arisen. It is only because justice can be done to the tenants in the conditions that we have attached that we have allowed dispensation in this case.

58. We would however add one more condition and that is, since Mr O'Reilly is a litigant in person he should as a condition of dispensation be awarded costs as a litigant in person. We assess those costs as being £140 for the day spent at the Tribunal.

59. With regard to individual service charge challenges, our findings are set out in the table attached to the decision.

60. Having regard to the success of the Applicants and the effect on the parties, the Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985.

Tribunal Judge: S Carrott

DISPUTED SERVICE CHARGE ITEMS

ITEM	TRIBUNAL'S DECISION
Door Entry System – challenged on the basis that not a chargeable item £4023	Properly chargeable to the tenants but a reduction warranted of 1/9th on the basis of the two new flats being served
Carpet Staircases	Allowed in full. The works were cost effective and did not constitute an improvement. £4855.56 allowed
Window Cill Concrete Repairs	£4401.87 allowed the Tribunal accepting the evidence of Mr Woodhouse as to how the sum has been arrived at
Repairs to Metal Windows	£5347.40 allowed. Tribunal accepts landlord's argument that metal windows part of the structure
Concrete Base to Windows	Disallowed – Tribunal accepts tenants evidence that this work did not need to be done and that the impetus for this work was the development of the new flats
Laying Paving Slabs and to Front Garden Areas and Clean Topsoil for Planting	£1520.87 allowed. The Tribunal accepts landlord's evidence that dpc being bridged and that work was therefore necessary
Making Good to Front Boundary Wall, Rendering Renew Copings and Railings etc	Tribunal allows £4247 on the basis that proved some repair work was needed but not to the extent suggested by the landlord
Clean Brickwork	£2000 – Tribunal accepts that this work is likely to have been done according to the landlord's evidence
Repoint Brickwork to Boundary Walls	£761.00 allowed. Tribunal accepts Mr Mountain's evidence
Hack Up Screeding Sub - base	Disallowed – Tribunal accepts Mr Mountain's evidence that included in work charged separately
Lay New Base	Allowed – accepts landlord's evidence that work has been done
New Gullies – Clear Gullies	Cost of New Gullies allowed - clearing of gullies disallowed. Mr Mountain's evidence accepted on this issue that both items do not sit comfortably with each other
Provide Security Lighting	£100 allowed – Tribunal accepts tenants evidence that only 1 light fitted
Clean and tidy site	£300 allowed. Tribunal accepts that

	this cost was incurred and it is reasonable and payable
Plasterwork Repairs (items 100 and 102)	Disallowed. Tribunal accepts that this is the result of flood damage caused by the contractors
Clean handrails and polish	Allowed. Tribunal accepts work was necessary following on from building works