10970

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LSC/2015/0030**
Property	:	**Flat 7, 1-8 Leith Mansions, Grantully Road, London W9 1LQ**
Applicant	:	**Ms C Kwack**
Representative	:	**Mr J Hughes of Portman Property Management**
Respondent	:	**Gemlord Property Management Limited**
Representative	:	**Mr C Green, Solicitors' Agent for LPC Law**
Type of Application	:	**For the determination of the liability to pay a service charge**
Also present	:	**Ms F Velji, supporting the Applicant**
Tribunal Members	:	**Judge P Korn (chairman)** **Mr M Taylor FRICS** **Mr O N Miller**
Date and venue of Hearing	:	**14th May 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15th June 2015**

DECISION

Decisions of the Tribunal

(1) The disputed charges are payable in full.

(2) The Tribunal gives unconditional retrospective dispensation from the section 20 consultation requirements in respect of the 2005 Simon & Dylan decorating works.

(3) The Tribunal declines to make a cost order against the Applicant or to make a section 20C order.

Introduction

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the reasonableness and payability of certain service charges.

2. The Applicant's challenge is to the following items:-

- building insurance premiums for service charge years 2002 to 2005 inclusive;
- legal & professional fees for the 2002 service charge year; and
- repairs charges for service charge years 2003 to 2005 inclusive.

3. The relevant statutory provisions are set out in the Appendix to this decision. The Applicant's lease ("**the Lease**") is dated 29th September 1982 and made between Nash Securities Limited (1) and the Applicant (2). The Respondent is the Applicant's current landlord.

Background

4. This application has been prompted by earlier proceedings between the same parties in relation to the Property which were determined on 10th July 2014. The earlier proceedings were initiated in the county court and then referred to the First-tier Tribunal and related to service charges for the years 2006 to 2013. The Applicant now wishes to challenge certain service charge items in the years 2002 to 2005.

Conceded points

5. After being questioned on the issue by the Tribunal, Mr Hughes said that the Applicant was no longer pursuing the challenge to the legal & professional fees. He also said that the Applicant was no longer pursuing the challenge to the repairs charges for 2004.

Limitation

6. At the hearing, the Respondent sought to argue as a preliminary point that the Applicant was time-barred from making an application in respect of the years 2002 to 2005. However, there was no indication in the directions issued following the case management conference on 10th February 2015 that this issue had been raised by anyone at the case management conference. At the hearing Mr Green said that he understood the point to have been mentioned but he conceded that he had not been present.

7. There are therefore no directions on the limitation point and there is no reference to limitation in the preamble to the directions, nor any evidence on which the Tribunal can rely that the Respondent has given prior notice of its intention to raise it as a preliminary issue. Furthermore, the Respondent has not at any stage prior to the hearing made written submissions on the point or made a written request to the Tribunal for permission to raise this point as a preliminary issue.

8. As noted at the hearing, the Applicant was not legally represented and – subject to any other considerations – in our view it was not reasonable to expect her to have to deal with a complex legal issue without being afforded an opportunity to take legal advice, especially given the absence of any reference to the issue in directions. As a minimum, if the issue was to be considered there would need to be an adjournment to another day to enable the Applicant to take legal advice. This was put to Mr Green who said that even if the Tribunal was prepared to adjourn the case, the Respondent did not wish to adjourn and would prefer to proceed without dealing with the limitation issue.

9. In the circumstances it was agreed that the case would proceed without dealing with limitation as a preliminary issue.

General initial point

10. It was accepted at the hearing by Mr Hughes that the Applicant had been a director of the Respondent company for the whole period between 2002 and 2013.

Applicant's case on insurance

11. The Applicant's position was that the building insurance premiums had been too high in each of the years 2002 to 2005 inclusive. In relation to 2002, Mr Hughes noted the Respondent's claim that it had obtained a survey report evidencing settlement in Flat 1 but the Respondent had not produced a copy of that report.

12. In written submissions, the Applicant stated that the overall level of premiums for 2002 appeared to be approximately 5% higher than comparable buildings in the area and that therefore a charge of £3,775.00 would be more reasonable. In response to questions from the Tribunal at the hearing, Mr Hughes said that this alternative figure was based on a desktop study carried out by himself, and he conceded that he has no expertise or qualifications relevant to the assessment of building insurance premiums nor any knowledge of the claims record for the building.

13. In relation to 2003, the Applicant stated in written submissions that the premiums had risen by 8.6%, that there was no evidence that the Respondent had sought competitive quotations, and that in her view the premium should be £3,888.00. At the hearing Mr Hughes said that this figure represented an inflationary increase based on the retail prices index. In relation to 2004, the Applicant was not disputing the terrorism element of the insurance but stated that the premium for the remainder of the building had risen by 30% and that again there was no evidence that the Respondent had sought competitive quotations. The Applicant felt that the increase for 2004 should – again – just be based on inflation. In relation to 2005, the Applicant stated that the premiums had risen by 5% and again that there was no evidence that the Respondent had sought competitive quotations.

14. At the hearing the Tribunal put it to Mr Hughes that there was a letter in the hearing bundle dated 13th January 2004 which appeared to show that the Respondent was at that point carrying out an insurance valuation of the building. Mr Hughes replied that there was no evidence in the accounts that the valuation had actually been carried out.

Respondent's response on insurance

15. Mr Green noted that in its directions issued on 10th February 2015 the Tribunal had warned the Applicant that she would need to adduce clear and cogent evidence in support of her claim, and in his submission she had failed to do so.

16. Mr Green referred the Tribunal to minutes of a meeting of the directors of the Respondent company held on 16th January 2002. In those minutes it was stated that the broker through whom the Respondent insured the building had offered an alternative to the then existing quotation from Norwich Union but that the directors had decided to remain with Norwich Union after reviewing the excesses. This was, in his submission, evidence of market-testing.

17. In her application the Applicant had complained of a lack of information, but Mr Green noted that the claim related to the period 2002 to 2005 and said that the Respondent had very little documentary

information in relation to this period. Much of the relevant documentation would have been lost or destroyed.

18. Mr Green also said that the Applicant had been a director of the Respondent company during the whole of the relevant period but did not take any interest in company matters until 2005. She had access to all of the relevant information at the time but had not looked at it.

19. Mr Green referred the Tribunal to a handwritten note from the company secretary dated 15th January 2003 referring to a conversation with the insurance broker as evidence that insurance premiums had been queried and that the Respondent had not been passive. That same note referred to a problem with subsidence, which in his submission would have affected insurance premiums and the Respondent's ability to move between insurers.

20. Mr Green also referred the Tribunal to minutes of a meeting of the directors of the Respondent company held on 3rd July 2002, which record the receipt of a surveyor's report on the building prompted by cracks in the bay of Flat 1, and to minutes of a meeting on 21st January 2003, which contained a detailed record of the obtaining of an insurance valuation and of attempts to renegotiate the insurance premium. In addition Mr Green referred the Tribunal to a handwritten undated telephone note of a discussion with the insurance broker and to a report on insurance at meetings on 13th January, 20th April, 13th September and 6th December 2004.

Applicant's case on repairs

21. Mr Hughes commented that the repairs in 2003 seemed mainly to be reactive. Invoice 579 from Peter Bouttell and part of invoice 580 (the £60 item) appeared to relate to the interior of individual flats and therefore should not have formed part of the service charge. Mr Hughes also questioned the wisdom of using a builder from Cambridge and considered that the builder's travelling expenses would have increased the cost.

22. Regarding the works in 2003 to inject chemical DPC in the light well wall, Mr Hughes questioned whether Peter Boutell was sufficiently experienced or substantial to deal with such matters. In relation to the invoice from M.J. Kloss for decorating, the Applicant did not know what decorating this related to. In relation to the charge for £150.00 referred to in a partially legible receipt dated 20th May 2003 Mr Hughes said that this appeared to relate to Flat 1.

23. In relation to the 2005 Simon & Dylan decorating charges of £4,429.75, the Applicant could find no evidence that the Respondent had been through the necessary section 20 consultation process. In addition, the

Applicant considered that the specification was not professionally prepared and that lower tenders might have been achieved. The Applicant also believed the works to have been substandard, but it was accepted at the hearing that she had no evidence of this. Mr Hughes' guess was that £2,000 would be a reasonable charge but he had no specific basis for this figure.

24. The Applicant was also challenging two specific invoices in 2005. In relation to the invoice for £588.00 dated 13th May 2005 from Diamond Electrical Installations Ltd, the Applicant did not know what this related to. In relation to the invoice for £294.93 dated 9th July 2005 from Gary Cleary, the Applicant said that this work – involving the removal and replacement of a lead pipe – appeared to relate to internal areas within Flats 3 and 5. The Tribunal put it to Mr Hughes, in relation to this latter invoice, that there might be a common supply running through pipes in individual flats, but Mr Hughes was unable to comment on this point.

Respondent's response on repairs

25. As a general observation, Mr Green submitted that the Applicant's evidence was very thin. In particular the Applicant had provided no alternative quotes as evidence that any of the charges were unreasonably high. Regarding the builder Peter Boutell, the Applicant seemed confused as to what her precise objection was. Mr Green again emphasised that the Applicant was a director and could have chosen to debate these issues with the other directors at the time but that she decided instead not to turn up to meetings.

26. Regarding the work to Flat 1, Mr Green said that the Respondent was concerned that the cracks could well be a sign of subsidence and therefore it was reasonable to deal with this issue as a service charge issue, as a timely and an effective resolution to the problem was of benefit to the whole building. In this regard Mr Green referred the Tribunal to clause 5(5)(l) of the Lease, under which the landlord covenants *"to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building"*. Mr Green also referred the Tribunal to paragraph 4 of a note of a directors' meeting on 21st January 2003 in which it was reported that a loss adjuster had inspected the cracks in Flat 1 and the directors were awaiting clarification as to whether it was an issue of subsidence.

27. In written comments on the Applicant's Scott Schedule, the Respondent stated that invoice 579 from Peter Bouttell related to repairs to the wall in Flat 1 (following a monitoring exercise) and that the disputed part of invoice 580 related to a problem caused by the removal of chimney pots some years earlier.

28. Regarding the chemical DPC works, the Applicant had produced no evidence to indicate that these works had not been carried out in a satisfactory manner. Whilst it was true that some further works needed to be done in 2010 the Respondent did not believe that this was due to any inadequacy in the 2003 works.

29. Regarding the M.J. Kloss invoice, this was for work to repair the damage in Flat 1, as stated by the Respondent in the Scott Schedule, in circumstances which benefited the whole building. Flat 1 was clearly, in the Respondent's view, the appropriate place to test for subsidence, and Mr Green referred the Tribunal to the relevant minutes of directors' meetings, in the hearing bundle. In relation to the charge for £150.00 referred to in the (partially legible) receipt dated 20th May 2003, Mr Green said that this too related to the monitoring of the apparent subsidence in Flat 1.

30. Due to the passage of time since these various charges were incurred (10 to 12 years) the Respondent's records were incomplete and it did not have any other specific evidence available in relation to the items in dispute apart from the various copy minutes of meetings in the hearing bundle.

31. In relation to the 2005 Simon & Dylan decorating charges of £4,429.75, the Respondent accepted that it had not been through a section 20 consultation process and was now seeking retrospective dispensation, as to which see below.

Respondent's case on dispensation

32. Mr Green took the Tribunal through the relevant paperwork in the hearing bundle. The proposals were referred to in minutes of a shareholders' annual general meeting held on 20th April 2004 attended by most leaseholders but not by the Applicant. The hearing bundle contained copy letters showing that three contractors had been approached, and there was also a letter to all shareholders (including the Applicant) setting out the process gone through so far by the Respondent and the further steps intended to be taken. The Applicant could have raised any questions or objections at that stage but did not do so. In addition, it was clear from minutes of a quarterly meeting on 13th September 2004 that directors of the Respondent (including the Applicant) were invited to recommend alternative contractors and/or to communicate any suggested amendments to the specification.

33. In Mr Green's submission the Applicant suffered no prejudice because she could have got involved by recommending alternative contractors and/or by suggesting amendments to the specification but chose not to do so. Furthermore, the formal note to all shareholders dated 17th March 2005 gave shareholders (including the Applicant) 4 weeks within which to make observations. Mr Green also referred to a note

from the company secretary to all shareholders dated 29th March 2005 giving further information on the proposed works summarising what had happened and what was intended. In addition, a directors' meeting was held on 6th July 2005 which the Applicant did choose to attend, and no complaints or concerns regarding the proposed works are recorded in the minutes of that meeting.

Applicant's response on dispensation

34. Mr Hughes conceded at the hearing that it was arguable that it would be reasonable for the Tribunal to give dispensation, although he still had a slight question as to whether the Respondent gave full consideration to the issues and therefore the Applicant's challenge remained. He also added, after a short adjournment, that his instructions were that the minutes of the directors' meetings did not accurately reflect the directors' discussions, but Mr Green countered that there was no evidential basis for the Applicant's assertions and he queried why she was only raising this objection now.

Tribunal's analysis

35. The Tribunal has noted the parties' respective written and oral submissions and has taken them into account in reaching its decision.

Insurance

36. We consider the Applicant's challenge to the building insurance premiums to be weak. The Applicant has produced no alternative quotations, whether 'like for like' or otherwise, nor has she offered comparable evidence as to premiums paid in relation to other buildings. Mr Hughes' alternative figures are based on what he has described as a desktop study carried out by himself. He conceded at the hearing that he has no expertise or qualifications relevant to the assessment of building insurance premiums, nor does he have any knowledge of the claims record for the building. The Respondent, by contrast, has provided some evidence some evidence of market testing and of general proactivity in relation to insurance issues.

37. A proper assessment of building insurance premiums is based on various factors and involves some expertise. In our view it is simplistic, to put it mildly, to argue that premiums should not go up by more than retail price inflation regardless of any other factors relevant to the insurance market or to the specific building in question.

38. It is established law that a landlord is not required to obtain the cheapest possible insurance available in order to establish that the insurance costs have been reasonably incurred. With the benefit of our knowledge of the insurance market and in the absence of any proper

evidence to support the Applicant's assertions – coupled with there being some evidence of subsidence and of a claims history – we consider that the insurance charges for each year of dispute have been reasonably incurred.

Repair

39. As noted by Mr Green, the Tribunal in its directions issued on 10th February 2015 warned the Applicant that she would need to adduce clear and cogent evidence in support of her claim, and we agree with Mr Green that, with isolated exceptions, she has failed to do so.

40. We do accept that it is legitimate to query whether invoices which appear on their face to relate to work done to the interior of individual flats should in fact be put through the service charge. However, on the balance of probabilities we accept the Respondent's evidence on the invoices in question. In our view the evidence supports the Respondent's contention that the works to Flat 1 which are the subject of the Applicant's challenge are properly to be regarded as service charge items. The evidence indicates a genuine and reasonable concern about subsidence which could have affected the whole building, and we accept that the landlord's covenant in clause 5(5)(l) of the Lease is wide enough to cover this. For the sake of completeness we would just add that the Applicant's service charge payment obligations under the Lease are based on "Total Expenditure" which is defined in the Fifth Schedule as *"the total expenditure incurred by the Lessors in any Accounting Period in carrying out their obligations under Clause 5(5) of this Lease ..."*.

41. Specifically regarding invoice 579, it is true that it is not apparent on the face of the invoice that it relates to the Flat 1 subsidence issue. However, the Respondent has stated in writing that it does and the Applicant has not brought any specific evidence other than the wording of the copy invoice. As a general point, we are influenced in part by the fact that the Applicant was herself a director of the Respondent company but chose not to query any invoices at the time nor, seemingly, to attend directors' meetings except very rarely. In addition, the work concerned was for the relatively small sum of £90.00 + VAT and the invoice is nearly 12 years old, and it is completely understandable that the Respondent does not have more detailed documentary evidence to draw on. A similar point applies to invoice 580.

42. We do not accept the Applicant's general objections to Peter Bouttell's charges, which do not appear to have been properly thought through. She has produced no cogent evidence that the charges are unreasonable or that the work was substandard.

43. In relation to the 2005 invoice for £588.00 from Diamond Electrical Installations Ltd, the fact that the Applicant does not know what this related to does not by itself constitute proof that it should not have formed part of the service charge. If it had been a more recent charge and the Respondent had no plausible explanation for its failure to produce evidence as to what the charge related to then this might have been sufficient to persuade us on the balance of probabilities that it is not properly payable. However, in the circumstances of this case – where the invoice is 10 years old and was not queried previously by the Applicant despite her having been a director of the Respondent company from 2002 to 2013 and where no other relevant evidence has been produced by the Applicant – we consider on the balance of probabilities that it is properly payable. In relation to the 2005 invoice for £294.93 from Gary Cleary the same point applies, and in addition we consider it to be a distinct possibility that this pipe was part of a system of pipes providing a common supply for the building.

Dispensation

44. The Respondent freely admits that it failed to comply with the formal section 20 consultation requirements in respect of the 2005 Simon & Dylan decorating works. This was, according to its written submissions, simply because it was not aware of these requirements at the time. Ignorance of the consultation requirements does not excuse a person from complying with them, nor does it – by itself – allow a landlord to escape the penalty for non-compliance set out in the legislation. However, in appropriate circumstances a tribunal is entitled to give dispensation from compliance with the consultation requirements and the Respondent has applied for dispensation in this case.

45. The evidence shows, in our view, that whilst the Respondent did not comply with the formal consultation requirements it did come quite close to doing so in a more informal way. It debated the need for the works and the specification, sought quotations from three contractors, wrote to leaseholders/shareholders to inform them as to the steps taken so far and the steps to be taken, provided updates and specifically invited the Applicant amongst others to suggest alternative contractors and to suggest amendments to the specification.

46. Indeed, even Mr Hughes conceded at the hearing on behalf of the Applicant that it was arguable that it would be reasonable for the Tribunal to give dispensation, although he still had a slight question as to whether the Respondent had given full consideration to the issues. In our view, though, the Applicant has offered no persuasive evidence to indicate that the Respondent failed to give full consideration to those issues.

47. In the Supreme Court decision in *Daejan Investments Limited v Benson and others (2013) UKSC 14*, Lord Neuberger (giving the majority judgment) stated that the issue on which a tribunal should focus when entertaining an application for dispensation from the consultation requirements must be the extent, if any, to which the tenants were prejudiced by the failure of the landlord to comply with the requirements in relation to either the cost or the appropriateness of the works. Lord Neuberger went on to state that, whilst the general legal burden of proof on an application for dispensation was on the landlord, the factual burden of identifying some relevant prejudice that the tenants would or might have suffered would be on the tenants themselves.

48. In the present case the Applicant has, in our view, failed to identify any relevant prejudice. In addition, the Applicant was a director of the Respondent company but seemingly chose not to take an interest in this matter at the relevant time. She was invited to suggest alternative contractors and to suggest amendments to the specification, and along with other leaseholders/shareholders she was provided with a reasonable amount of information.

49. In the circumstances we are satisfied that the Applicant has failed to satisfy the factual burden on the tenant identified by the Supreme Court in *Daejan Investments Limited v Benson and others* and that unconditional dispensation should be given in this case.

Cost Applications

50. The Respondent has applied for an order under paragraph 13(b)(ii) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the 2013 Rules**") that the Applicant reimburse its costs incurred in connection with these proceedings. Such an order can only be made if the other party "has acted unreasonably in bringing, defending or conducting proceedings". In the case of *Ridehalgh v Horsfield (1994) 3 All ER 848* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct admits of a reasonable explanation. This formulation was adopted by the Upper Tribunal (Lands Chamber) in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007.*

51. Whilst we consider the Applicant's case to have been weak, in our view there is insufficient evidence from which to conclude that her conduct does not admit of a reasonable explanation. In our view, on the balance of probabilities she genuinely believed her application to have some merit and she was entitled to lodge it. In addition, a cost award can only be made on the basis that the unreasonable conduct has caused those costs to be incurred, and on the basis of the evidence provided we are not persuaded that the Respondent has shown that the Applicant's

approach has caused it to spend more time putting together its defence than it would have had to spend if the Applicant had made more detailed or more persuasive submissions. Therefore we do not consider that the Applicant has acted unreasonably within the meaning of – and for the purposes of – paragraph 13(b)(ii) of the 2013 Rules and accordingly we decline to make such an order.

52. The Applicant has applied for a section 20C order, this being an order that the Respondent may not include in the service charge any costs, or a proportion of the costs, incurred in connection with these proceedings. We decline to make such an order. The Respondent has been successful on all issues and, on the basis of what we have seen and heard, it has conducted itself in a reasonable manner. It would therefore be inappropriate in our view to make such an order.

Name: Judge P Korn **Date:** 15th June 2015

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited ... unless the consultation requirements have been either –

(a) complied with in relation to the works or agreement, or (b) dispensed with ... .

Section 20ZA

(1) Where an application is made to a 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 the appropriate 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 the appropriate 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.