1B045

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LSC/2018/0217** **LON/00AG/LDC/2018/0117**
Property	:	**26 Highgate West Hill London N6 6NP**
Applicant	:	**Mr E Ahmadi and Ms A Almakiewicz**
Representatives	:	**-**
Respondent	:	**Mr M Szwarczewski (basement flat) and Mr P Green (top floor flat)**
Representative	:	**Charles Russell Speechlys, solicitors**
Type of Application	:	**Reasonableness of and liability for service charges under the Landlord and Tenant Act 1985** **To dispense with the requirement to consult the Respondents about major works pursuant to S. 20ZA of the Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge Professor Robert M. Abbey** **Mr Chris Gowman MCIEH (Professional Member)**
Date and venue of Paper Based Decision	:	**2nd October 2018 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**2nd October 2018**

DECISION

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Decisions of the tribunal

1. The tribunal determines that the service charges for the property are payable as follows:-

   Service Charges

   For 2011-2012 the amount is £312.50, the same for 2012-2013 and 2013-2014. For 2014-2015 the amount is £397.50, for 2015-2016 the amount is £135.00 and for 2016-2017 the amount is £405. Finally, the sum of £235 is for the period March 2017 to September 2017.

   For the "cost of a restriction to basement flat" in the sum of £240 in the year 2013-2014, this amount is disallowed in full.

   For the surveyors fees of £1080 for each respondent these amounts are disallowed in full

   For the first floor renovation these charges are disallowed in full.

   For the guttering costs and the other major works as the tribunal has declined to grant dispensation these items are also disallowed.

2. The tribunal declines to grant the application for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and tenant Act 1985 (Section 20ZA of the same Act).

3. The reasons for our decisions are set out below.

The application and procedural background

4. The Applicant seeks a determination under section 27A of the Landlord and Tenant Act 1985 ("The Act") as to whether service charges are reasonable and payable.

5. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

5 The Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all the consultation requirements imposed on the landlord by section 20 of the 1985 Act, (see the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI2003/1987), Schedule 4.) The request for dispensation concerns the major works detailed in the tribunal

application and identified in the tribunal direction dated 9 July 2018 at paragraphs 4 (e) and 5.

6. Section 20ZA relates to consultation requirements and provides as follows:

> *"(1)Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.*
> *(2)In section 20 and this section—*
> *"qualifying works" means works on a building or any other premises, and*
> *"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.*
> *....*
> *(4)In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.*
> *(5)Regulations under subsection (4) may in particular include provision requiring the landlord—*
> *(a)to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,*
> *(b)to obtain estimates for proposed works or agreements,*
> *(c)to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,*
> *(d)to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and*
> *(e)to give reasons in prescribed circumstances for carrying out works or entering into agreements.*

The paper based decision

7. The tribunal decided that in view of the limited nature of the application that the decision could be taken on paper and without the cost of an oral hearing. Written submissions were requested of the parties.

8. The tribunal had before it bundles from both parties as well as several letters, submissions and copy deeds and documents from the parties to the dispute.

The background

9. The applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

10. The landlord applicant claimed service charges for the period from 2011 to 2017 ranging between £312.50 and £405 per annum. In addition there was also in dispute the "cost of a restriction to basement flat" in the sum of £240 in the year 2013-2014 and whether that sum constitutes a service charge or an administration charge or neither. Another item in dispute was in regard to certain surveyors fees amounting to £1080. Similarly disputes arose regarding the cost of first floor renovation in the sums of £1000 and £2000 as well as contributions to exterior renovations in the sum of £4537.50 in anticipation of the works being carried out and £425 for the installation of a new gutter. These items were all particularised in the tribunal directions dated 9 July 2018 at paragraph 4, a through to f. It is these sums that are in dispute and are the items referred to the tribunal.

The service charges claimed

11. Having read the submissions from the parties and considered all of the documents provided, the tribunal determines the issue as follows. However the tribunal wish to make it clear that the bundle of documents running to some 750 pages and prepared by the applicant has not helped the tribunal as a consequence of the inclusion of many items that seemed to the tribunal to be irrelevant or relate to an enfranchisement case in the County Court at Central London and between the same parties.

12. Turning to each year in question the tribunal was able to locate in the bundle the relevant demands, the summary of tenant's rights and obligations and a description of the costs incurred for each year. For 2011-2012 the amount is £312.50, the same for 2012-2013 and 2013-2014. For 2014-2015 the amount is £397.50, for 2015-2016 the amount is £135.00 and for 2016-2017 the amount is £405. Similarly the sum of £235 is for the period March 2017 to September 2017. The tribunal is satisfied that these amounts are reasonable and payable by the respondent.

13. One particular point of dispute related to the "cost of a restriction to basement flat" in the sum of £240 in the year 2013-2014 and whether that sum constitutes a service charge or an administration charge or neither. This charge appears to relate to a land registry restriction in form RX1. This is a protective entry at the land registry that would be made to assist the applicant and in the view of the tribunal may not represent a service charge but could be an

administration charge. Indeed the applicant refers to covenants 5(f) and section 3 (15) neither of which could be seen to authorise a service charge but could be an administration charge. However, the tribunal could not find any supporting evidence in regard to this charge and noted that it only related to one flat and not the block as a whole. In these circumstances this charge will be disallowed in full.

14. The next particular point of dispute related to the chartered surveyor costs of £1080 for each respondent. The tribunal has seen invoices from the Surveyors addressed to the two respondents in the sum of £1080 accompanied by a letter to them referring to their instructions. However, at page 108 of the trial bundle the applicant says that "the fee may have gone up from 2014 to today date perhaps 1500". This is not appropriate to an administration charge which must be fixed, clear and exactly quantified. Accordingly the tribunal disallows the charges in full

15. The tribunal noted that there seemed to be a partial claim against one of the respondents (Mr Green) regarding renovation to the first floor bathroom and kitchen arising from flooding. (This is the item that the tribunal takes as that mentioned in the directions of 9 July 2018 at paragraph 4 (d). This appeared to the tribunal to represent a potential insurance claim item between the applicant and Mr Green and not a service charge and consequently the tribunal disallows the particular claim in full.

16. For the guttering costs and the other major works as the tribunal has declined to grant dispensation, see below, these items are also disallowed. The reasons for this will be evident from the reasons set out below but in particular it is not appropriate to approve estimated on account charges when the ownership of the freehold reversion is about to change.

20ZA dispensation application and decision

17. The only issue for the tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements. This second application does not concern the issue of whether or not service charges will be reasonable or payable.

18. Having read the evidence and submissions from the Applicant and having considered all of the copy deeds documents and reports provided by the parties, the tribunal determines the dispensation issues as follows.

19. Section 20 of the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England)

Regulations 2003 require a landlord planning to undertake major works, where a leaseholder will be required to contribute over £250 towards those works, to consult the leaseholders in a specified form.

20. Should a landlord not comply with the correct consultation procedure, it is possible to obtain dispensation from compliance with these requirements by such an application as is this one before the tribunal. Essentially the tribunal have to be satisfied that it is reasonable to do so.

21. In the case of *Daejan Investments Limited v Benson* [2013] UKSC 14 by a majority decision (3-2), the Supreme Court considered the dispensation provisions and set out guidelines as to how they should be applied.

22. The Supreme Court came to the following conclusions:

a. The correct legal test on an application to the tribunal for dispensation is:

"Would the flat owners suffer any relevant prejudice, and if so, what relevant prejudice, as a result of the landlord's failure to comply with the requirements?"

b. The purpose of the consultation procedure is to ensure leaseholders are protected from paying for inappropriate works or paying more than would be appropriate.

c. In considering applications for dispensation the tribunal should focus on whether the leaseholders were prejudiced in either respect by the landlord's failure to comply.

d. The tribunal has the power to grant dispensation on appropriate terms and can impose conditions.

e. The factual burden of identifying some relevant prejudice is on the leaseholders. Once they have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it.

f. The onus is on the leaseholders to establish:

i. what steps they would have taken had the breach not happened and

ii. in what way their rights under (b) above have been prejudiced as a consequence."

23. Accordingly the tribunal had to consider whether there was any prejudice that may have arisen out of the conduct of the lessor and whether it was reasonable for the tribunal to grant dispensation following the guidance set out above.

24. First, the tribunal is of the view that they could find prejudice to the respondent/tenants of the two properties by the works proposed to be carried out by the applicant. The respondent believes that the "urgent" works that are required have been put forward to put pressure on the respondent in relation an enfranchisement case that has been progressing under the terms of the Leasehold Reform Housing and Urban Development Act 1993. The tribunal has been advised that the freehold of the property is due to be imminently transferred to the respondent pursuant to the terms of the 1993 Act and there is a vesting order dated 19 June 2018 that has been shown to the tribunal. A payment into Court has been made and consequently the respondent says that "in the circumstances we expect the transfer to take place imminently". In these circumstances it is not reasonable to grant dispensation bearing in mind the transfer of the freehold is due very shortly and therefore it is plainly not appropriate for the applicant to embark upon major works so close to the point of transfer.

25. Secondly, it would appear from the papers before the tribunal that the need for the works to the exterior arose in 2014 and yet the consultation application has arisen several years later. Furthermore it is not possible for the respondent to comment on the costs of the exterior works as the estimates provided are plainly out of date. It would seem from the applicant's evidence that the agreement with a builder relating to the works is dated 7 June 2016. The tribunal is satisfied that there is prejudice to the respondent. The applicant has failed to produce evidence of recent tenders or estimates for the costs of the works. It would be unreasonable for the Applicant to seek to recover sums based upon out of date material. It should be remembered that the purpose of the consultation procedure is to ensure leaseholders are protected from paying for inappropriate works or paying more than would be appropriate

26. Therefore on the evidence before it the tribunal believes that it is not reasonable to allow dispensation in relation to the subject matter of the dispensation application.

Name: Judge Professor Robert M. Abbey **Date:** 2nd October 2018

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

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 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.

20 Limitation of service charges: consultation requirements

(1)Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

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

(b)dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3)This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4)The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a)if relevant costs incurred under the agreement exceed an appropriate amount, or

(b)if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5)An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a)an amount prescribed by, or determined in accordance with, the regulations, and

(b)an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6)Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7)Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.